

This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

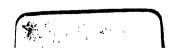
- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + Refrain from automated querying Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at http://books.google.com/



(Wilk 100) 145





		·	
		• ·	

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Queen's Bench Practice Court;

WITH THE

POINTS OF PLEADING AND PRACTICE

DECIDED IN THE COURTS OF

Common Pleas and Exchequer;

FROM

TRINITY TERM, 1848, TO EASTER TERM, 1849.

BY ALFRED DOWLING,

SERJEANT AT LAW,

AND JOHN JAMES LOWNDES,

OF THE INNER TEMPLE, ESQ., BARRISTER AT LAW.

VOL. VI.

LONDON:

8. SWEET; V. & B. STEVENS & G. S. NORTON, AND A. MAXWELL & SON, Law Booksellers & Publishers;

DUBLIN:

HODGES AND SMITH, GRAFTON STREET.

1850.



LONDON:
RATHER AND HODGES. PRINTERS,
109. Fetter Lane, Fleet Street.

TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.	:
Page	Page
Adams and Another v. Free-	Benett v. Peninsular, &c.
mantle and Others 10	Steam Boat Company - 387
Addison and Spittle, In re - 531	Berkshire (Justices of), Re-
Anderson, Shropshire Union	gina v 507
Railway Company v 483	Bevill, Platell v 2
Angas, Ness v 645	Bishop, Regina v 499
Angell, <i>In re</i> 144	Blandy v. De Burgh 412
Astley v. Fisher 376	Bletchingdon, (The Survey-
risdey v. Fisher 510	ors of) v. Peyton 289
	Bluck, Richards v 325, 334
В.	Boodle and Others, Newton
ъ.	v 351, 352
D-11 1 A T 790	· · · · · · · · · · · · · · · · · ·
Bailey and Another v. Turner 730	
Bament, Stutton v 632	v. Williams 235
Bank of England v. Johnson 458	Boxer, Jones v 574
Bardell v. Miller 721	Boyd, M'Dowall v 149
Basingstoke, (Inhabitants of),	Bradley, Griffin v 394
Regina v 303	Braham v. Hunter 129
Beart, Jeffreys v.	Brooker v. Cooper 199
Ante, vol. 5, p. 646	Brown v. De Winton - 62
Beauclerk, Haldane v 642	—, Nash v 329
Belcher and Others v. Patten 370	Burgess, Gell v 547
VOL. VI.	a 2 D. & L.

Burmester v. Cropton 430 Butler v. Corney 45 Byrne v. Knipe 45		
C. Campbell, Place v 113 Cattlin, In re 566 Caunt v. Thompson - 621 Chadwick, Morrison v 567 Challis and Another, Connop v 48 Chaplin and Another v. Showler 227 Christmas v. Eicke - 156 City Steam Boat Company, Woolf v 606 Clark, Curleweis v 455 Clarke and Others v. East India Company - 278 Cluston, Nunn v 637 Claston, Nunn v 637 Clossman v. White - 563 Clutterbuck v. Jones and Another 251 Conope, Challis and Another v 187 Cooper, Brooker v 199 —, Soames and Another v 288 Corden v. Universal Gas Light Company 109, 379, 384 Corney, Butler v 45 Couling v. Coxe - 399 Craig and Another v. Lloyd 487 Crockford v. Tucker - 542 Cropton, Burmester v 430 Cross v. London Assurance Company 250 Crossfield v. Morrison - 608 Cubitt and Another, Morgan	Burmester v. Cronton - 430	Cumberland (Justices of)
C. Campbell, Place v 113 Cattlin, In re 566 Caunt v. Thompson - 621 Chadwick, Morrison v 567 Challis and Another, Connop v 48 Chaplin and Another v. Showler 227 Christmas v. Eicke - 156 City Steam Boat Company, Woolf v 606 Clark, Curleweis v 455 Clarke and Others v. East India Company - 278 Cluston, Nunn v 637 Claston, Nunn v 637 Clossman v. White - 563 Clutterbuck v. Jones and Another 251 Conope, Challis and Another v 187 Cooper, Brooker v 199 —, Soames and Another v 288 Corden v. Universal Gas Light Company 109, 379, 384 Corney, Butler v 45 Couling v. Coxe - 399 Craig and Another v. Lloyd 487 Crockford v. Tucker - 542 Cropton, Burmester v 430 Cross v. London Assurance Company 250 Crossfield v. Morrison - 608 Cubitt and Another, Morgan	Rutlon m. Corney 45	Dog a Auto nol 5 m 420
Campbell, Place v 113 Cattlin, In re 566 Caunt v. Thompson - 621 Chadwick, Morrison v 567 Challis and Another, Connop v 581 Chaplin and Another v. Showler 227 Christmas v. Eicke - 156 City Steam Boat Company, Woolf v 606 Clark, Curleweis v 455 Clarke and Others v. East India Company 278 Clossman v. White - 563 Clutterbuck v. Jones and Another 251 Connop v. Challis and Another v 567 Clutterbuck v. Jones and Another 251 Connop v. Challis and Another v. Levy 282 Cooke, Freeman and Another v 187 Cooper, Brooker v 199 500 Coxe, Couling v. Coxe - 399 Craig and Another v. Lloyd 47 Crockford v. Tucker - 542 Cropton, Burmester v 399 Craig and Another v. Lloyd 477 Cross v. London Assurance Company 250 Cubitt and Another, Morgan Care v. London Assurance Company 250 Cubitt and Another, Morgan Care v. Clark - 435 Curleweis v. Clark - 437 Dakins, Harvey v 437 Dakins, Peterson and Another v 385 Darington v. Price - 114 Dakins, Harvey v 437 Dakins, Peterson and Another v 385 Darington v. Price - 114 Dakins, Harvey v 437 Dakins, Peterson and Another v 385 Darington v. Price - 147 Dawson v. Wrench and Others v 669 Dawon v. Vrench and Another v 527 Deane and Another v 557 Dickson, Hoare v 577 Dickson, Hoare v 577 Dinsdale,	Dune Vice	Reg. v. Ante, vol. 5, p. 450
C. Campbell, Place v 113 Cattlin, In re 566 Caunt v. Thompson - 621 Chadwick, Morrison v 567 Challis and Another, Connop v 881 Chaplin and Another v. Showler 227 Christmas v. Eicke - 156 City Steam Boat Company, Woolf v 606 Clark, Curleweis v 455 Clarke and Others v. East India Company - 278 Stilwell v 436 Claxton, Nunn v 637 Clossman v. White - 563 Clutterbuck v. Jones and Another 251 Connop v. Challis and Another v. Levy 282 Cooke, Freeman and Another v. Levy 282 Cooke, Freeman and Another v 256 Clarke and Others v 257 Dickinson, Hoare v 577 Dickson, Hoare v 577 Dinsdale, Symonds v 170 Dodd v. Wigley 558 Dodd v. Wigley - 558 Dodd v. Wigley 558 Dodd v. Wigley 558 Dodd v	byrne v. Knipe,	
C. Campbell, Place v 113 Cattlin, In re 566 Caunt v. Thompson - 621 Chadwick, Morrison v 567 Challis and Another, Connop v 881 Chaplin and Another v. Showler 227 Christmas v. Eicke - 156 City Steam Boat Company, Woolf v 606 Clark, Curleweis v 455 Clarke and Others v. East India Company - 278 Stilwell v 436 Claxton, Nunn v 637 Clossman v. White - 563 Clutterbuck v. Jones and Another 251 Connop v. Challis and Another v. Levy 282 Cooke, Freeman and Another v. Levy 282 Cooke, Freeman and Another v 256 Clarke and Others v 257 Dickinson, Hoare v 577 Dickson, Hoare v 577 Dinsdale, Symonds v 170 Dodd v. Wigley 558 Dodd v. Wigley - 558 Dodd v. Wigley 558 Dodd v. Wigley 558 Dodd v	Ante, vol. 5, p. 659	tass 723
D.		Curleweis v. Clark 455
D.		
Campbell, Place v 113 Cattlin, In re 566 Caunt v. Thompson - 621 Chadwick, Morrison v. 567 Challis and Another, Connop v 48	С.	
Cattlin, In re 566 Caunt v. Thompson - 621 Chadwick, Morrison v 567 Challis and Another, Connop v 48		D.
Cattlin, In re 566 Caunt v. Thompson - 621 Chadwick, Morrison v 567 Challis and Another, Connop v 48	Campbell, Place v 113	
Caunt v. Thompson - 621 Chadwick, Morrison v 567 Challis and Another, Connop v 48 Chaplin and Another v. Showler 227 Christmas v. Eicke - 156 City Steam Boat Company, Woolf v 606 Clark, Curleweis v 455 Clarke and Others v. East India Company - 278 Clarke and Others v. East India Company - 278 Clarke and Others v. East India Company - 278 Clarke and Others v. East India Company - 278 Clossman v. White - 563 Clutterbuck v. Jones and Another 251 Connop v. Challis and Another v. — and Another v. Levy 282 Cooke, Freeman and Another v. — 187 Cooper, Brooker v 199 — —, Soames and Another v. — 288 Corden v. Universal Gas Light Company 109, 379, 384 Correy, Butler v 450 Couling v. Coxe - 399 Coxe, Couling v. Coxe - 399 Coxe, Couling v. Tucker - 542 Cropton, Burmester v. 430 Cross v. London Assurance Company 250 Cubitt and Another, Morgan	Cattlin. In re 566	Dakins Harvey v 437
Davis, Peterson and Another Paris Paris	Caunt v. Thompson - 691	D'Arcy Graham a - 385
Davis, Peterson and Another Paris Paris	Chadwick Morrison a 567	Dannington a Price - 114
v	Challie and Another Corner	Darrington v. 1 rice 114
Chaplin and Another v. Showler		
Chaplin and Another v. Showler	0 48	0 79
Chaplin and Another v. Showler	, Edmonds	Dawson v. Wrench and
Other v	v 581	
Christmas v. Eicke 156 City Steam Boat Company, Woolf v 606 Clark, Curleweis v 455 Clarke and Others v. East India Company 278 ——, Stilwell v 436 Claxton, Nunn v 637 Clossman v. White 563 Clutterbuck v. Jones and Another 251 Connop v. Challis and Another v 187 Cooper, Brooker v 199 ——, Soames and Another v 288 Corden v. Universal Gas Light Company 109, 379, 384 Corney, Butler v 45 Couling v. Coxe - 399 Coxe, Couling v 399 Craig and Another v. Lloyd 487 Crockford v. Tucker - 542 Cropton, Burmester v 430 Cross v. London Assurance Company 250 Crossfield v. Morrison - 608 Cubitt and Another, Morgan		Deacon, Townsend and An-
Christmas v. Eicke 156 City Steam Boat Company, Woolf v 606 Clark, Curleweis v 455 Clarke and Others v. East India Company 278 ——, Stilwell v 436 Claxton, Nunn v 637 Clossman v. White 563 Clutterbuck v. Jones and Another 251 Connop v. Challis and Another v 187 Cooper, Brooker v 199 ——, Soames and Another v 288 Corden v. Universal Gas Light Company 109, 379, 384 Corney, Butler v 45 Couling v. Coxe - 399 Coxe, Couling v 399 Craig and Another v. Lloyd 487 Crockford v. Tucker - 542 Cropton, Burmester v 430 Cross v. London Assurance Company 250 Crossfield v. Morrison - 608 Cubitt and Another, Morgan	Showler 227	other v 659
City Steam Boat Company, Woolf v 606	Christmas v. Eicke 156	Deane and Another, Turner
Dearie and Others v. Hender- Clark, Curleweis v 455 Clarke and Others v. East India Company 278 ——, Stilwell v 436 Claxton, Nunn v 637 Clossman v. White 563 Clutterbuck v. Jones and Another 251 Connop v. Challis and Another v. Levy 282 Cooke, Freeman and Another v 187 Cooper, Brooker v 199 ——, Soames and Another v. Louch 270 Cooper, Brooker v 199 ——, Soames and Another v. Louch 270 Cooper, Brooker v 199 ——, Soames and Another v. Louch 270 Cooper, Brooker v 199 Corden v. Universal Gas Light Company 109, 379, 384 Corney, Butler v 45 Couling v. Coxe - 399 Coxe, Couling v 399 Croskford v. Tucker 542 Cropton, Burmester v 430 Cross v. London Assurance Company 250 Crossfield v. Morrison - 608 Cubitt and Another, Morgan Marks and Another v. Hender-son and Another v. Hould webster v 527 De Winton, Brown v 62 De Winton, Brown v 577 Dinsdale,	City Steam Boat Company.	and Others v 669
Clarke and Others v. East India Company - 278 India Company v 2637 India Company v. Coxe - 270 India Company v. Coxe v. London Assurance India Company v. Clarke India Company v. Clarke India C	Woolf v 606	Dearie and Others v. Hender-
Clarke and Others v. East India Company - 278 India Company v 2637 India Company v. Coxe - 270 India Company v. Coxe v. London Assurance India Company v. Clarke India Company v. Clarke India C	Clark Curleweis a - 455	
India Company	Clarke and Others of Fast	D'Ehron Schmidt - 749
Clutterbuck v. Jones and Another 251 Connop v. Challis and Another v. Levy 282 Cooke, Freeman and Another v 187 Cooper, Brooker v 199 ——, Soames and Another v. Louch - 270 Cooper, Brooker v 199 ——, Soames and Another v. Louch - 270 —— d. Marks and Another v. Roe 87 —— d. Poole v. Willes and Others 253 —— d. Smith v. Roe 544 —— v. Wellsman - 179 —— d. Woodhouse v. Roe 192 Coxe, Couling v 399 Coxe, Couling v 399 Craig and Another v. Lloyd 487 Crockford v. Tucker 542 Cropton, Burmester v 430 Cross v. London Assurance Company 250 Cross field v. Morrison - 608 Cubitt and Another, Morgan Dickson, Hoare v 577 Dinnsdale, Symonds v 17 Dodd v. Wigley 558 Dodgson v. Scott 27 —— d. Marks and Another v. Roe 87 —— d. Smith v. Roe 544 —— v. Wellsman - 179 —— d. Woodhouse v. Roe 192 Don, Phillips v 527 Durell, Kearns v 357 East India Company, Clarke and Others v 278 East India Company, Clarke and Others v 278 East India Company, Clarke and Others v 278 Eastern Counties Railway	India Company 079	De Burgh Blands # 410
Clutterbuck v. Jones and Another 251 Connop v. Challis and Another v. Levy 282 Cooke, Freeman and Another v 187 Cooper, Brooker v 199 ——, Soames and Another v. Louch - 270 Cooper, Brooker v 199 ——, Soames and Another v. Louch - 270 —— d. Marks and Another v. Roe 87 —— d. Poole v. Willes and Others 253 —— d. Smith v. Roe 544 —— v. Wellsman - 179 —— d. Woodhouse v. Roe 192 Coxe, Couling v 399 Coxe, Couling v 399 Craig and Another v. Lloyd 487 Crockford v. Tucker 542 Cropton, Burmester v 430 Cross v. London Assurance Company 250 Cross field v. Morrison - 608 Cubitt and Another, Morgan Dickson, Hoare v 577 Dinnsdale, Symonds v 17 Dodd v. Wigley 558 Dodgson v. Scott 27 —— d. Marks and Another v. Roe 87 —— d. Smith v. Roe 544 —— v. Wellsman - 179 —— d. Woodhouse v. Roe 192 Don, Phillips v 527 Durell, Kearns v 357 East India Company, Clarke and Others v 278 East India Company, Clarke and Others v 278 East India Company, Clarke and Others v 278 Eastern Counties Railway	Gailmall 400	Delegii, Dianuy v 412
Clutterbuck v. Jones and Another 251 Connop v. Challis and Another v. Levy 282 Cooke, Freeman and Another v 187 Cooper, Brooker v 199 ——, Soames and Another v. Louch - 270 Cooper, Brooker v 199 ——, Soames and Another v. Louch - 270 —— d. Marks and Another v. Roe 87 —— d. Poole v. Willes and Others 253 —— d. Smith v. Roe 544 —— v. Wellsman - 179 —— d. Woodhouse v. Roe 192 Coxe, Couling v 399 Coxe, Couling v 399 Craig and Another v. Lloyd 487 Crockford v. Tucker 542 Cropton, Burmester v 430 Cross v. London Assurance Company 250 Cross field v. Morrison - 608 Cubitt and Another, Morgan Dickson, Hoare v 577 Dinnsdale, Symonds v 17 Dodd v. Wigley 558 Dodgson v. Scott 27 —— d. Marks and Another v. Roe 87 —— d. Smith v. Roe 544 —— v. Wellsman - 179 —— d. Woodhouse v. Roe 192 Don, Phillips v 527 Durell, Kearns v 357 East India Company, Clarke and Others v 278 East India Company, Clarke and Others v 278 East India Company, Clarke and Others v 278 Eastern Counties Railway		Delaneid, webster v 597
Clutterbuck v. Jones and Another 251 Connop v. Challis and Another v. Levy 282 Cooke, Freeman and Another v 187 Cooper, Brooker v 199 ——, Soames and Another v. Louch - 270 Cooper, Brooker v 199 ——, Soames and Another v. Louch - 270 —— d. Marks and Another v. Roe 87 —— d. Poole v. Willes and Others 253 —— d. Smith v. Roe 544 —— v. Wellsman - 179 —— d. Woodhouse v. Roe 192 Coxe, Couling v 399 Coxe, Couling v 399 Craig and Another v. Lloyd 487 Crockford v. Tucker 542 Cropton, Burmester v 430 Cross v. London Assurance Company 250 Cross field v. Morrison - 608 Cubitt and Another, Morgan Dickson, Hoare v 577 Dinnsdale, Symonds v 17 Dodd v. Wigley 558 Dodgson v. Scott 27 —— d. Marks and Another v. Roe 87 —— d. Smith v. Roe 544 —— v. Wellsman - 179 —— d. Woodhouse v. Roe 192 Don, Phillips v 527 Durell, Kearns v 357 East India Company, Clarke and Others v 278 East India Company, Clarke and Others v 278 East India Company, Clarke and Others v 278 Eastern Counties Railway	Claxton, Nunn v 637	De Winton, Brown v 62
Another	Clossman v. White 563	Dickinson, Hoare v 577
Cooke, Freeman and Another v 187 Cooper, Brooker v 199 —, Soames and Another v 238 Corden v. Universal Gas Light Company 109, 379, 384 Corney, Butler v 45 Couling v. Coxe - 399 Coxe, Couling v 399 Coxe, Couling v 399 Craig and Another v. Lloyd 487 Crockford v. Tucker 542 Cropton, Burmester v 430 Cross v. London Assurance Company 250 Cross field v. Morrison - 608 Cubitt and Another, Morgan Doe d. Harrison and Another v. Louch 270 — d. Marks and Another v. Roe 87 — d. Smith v. Roe 544 — v. Wellsman 179 — d. Woodhouse v. Roe 192 Don, Phillips v 527 Durell, Kearns v 357 East India Company, Clarke and Others v 278 East India Company, Clarke and Others v 278 Cubitt and Another, Morgan	Clutterbuck v. Jones and	Dickson, Hoare v 577
Cooke, Freeman and Another v 187 Cooper, Brooker v 199 —, Soames and Another v 238 Corden v. Universal Gas Light Company 109, 379, 384 Corney, Butler v 45 Couling v. Coxe - 399 Coxe, Couling v 399 Coxe, Couling v 399 Craig and Another v. Lloyd 487 Crockford v. Tucker 542 Cropton, Burmester v 430 Cross v. London Assurance Company 250 Cross field v. Morrison - 608 Cubitt and Another, Morgan Doe d. Harrison and Another v. Louch 270 — d. Marks and Another v. Roe 87 — d. Smith v. Roe 544 — v. Wellsman 179 — d. Woodhouse v. Roe 192 Don, Phillips v 527 Durell, Kearns v 357 East India Company, Clarke and Others v 278 East India Company, Clarke and Others v 278 Cubitt and Another, Morgan		Dimsdale, Symonds v 17
Cooke, Freeman and Another v 187 Cooper, Brooker v 199 —, Soames and Another v 238 Corden v. Universal Gas Light Company 109, 379, 384 Corney, Butler v 45 Couling v. Coxe - 399 Coxe, Couling v 399 Coxe, Couling v 399 Craig and Another v. Lloyd 487 Crockford v. Tucker 542 Cropton, Burmester v 430 Cross v. London Assurance Company 250 Cross field v. Morrison - 608 Cubitt and Another, Morgan Doe d. Harrison and Another v. Louch 270 — d. Marks and Another v. Roe 87 — d. Smith v. Roe 544 — v. Wellsman 179 — d. Woodhouse v. Roe 192 Don, Phillips v 527 Durell, Kearns v 357 East India Company, Clarke and Others v 278 East India Company, Clarke and Others v 278 Cubitt and Another, Morgan	Connop v. Challis and Another 48	Dodd v. Wigley 558
Cooke, Freeman and Another v 187 Cooper, Brooker v 199 —, Soames and Another v 238 Corden v. Universal Gas Light Company 109, 379, 384 Corney, Butler v 45 Couling v. Coxe - 399 Coxe, Couling v 399 Coxe, Couling v 399 Craig and Another v. Lloyd 487 Crockford v. Tucker 542 Cropton, Burmester v 430 Cross v. London Assurance Company 250 Cross field v. Morrison - 608 Cubitt and Another, Morgan Doe d. Harrison and Another v. Louch 270 — d. Marks and Another v. Roe 87 — d. Smith v. Roe 544 — v. Wellsman 179 — d. Woodhouse v. Roe 192 Don, Phillips v 527 Durell, Kearns v 357 East India Company, Clarke and Others v 278 East India Company, Clarke and Others v 278 Cubitt and Another, Morgan	and Another v. Levy 282	Dodgson v. Scott 27
v		Doe d. Harrison and An-
	v 187	
	Cooper, Brooker v 199	
v -	Soames and Another	
Corden v. Universal Gas Light Company 109, 379, 384 Corney, Butler v 45 Couling v. Coxe 399 Coxe, Couling v 399 Craig and Another v. Lloyd 487 Crockford v. Tucker 542 Cropton, Burmester v 430 Cross v. London Assurance Company 250 Crossfield v. Morrison - 608 Cubitt and Another, Morgan Others 253 — d. Smith v. Roe 544 — v. Wellsman 179 — d. Woodhouse v. Roe 192 Don, Phillips v 527 Durell, Kearns v 357 East India Company, Clarke and Others v 278 East India Company, Clarke and Others v 278 Eastern Counties Railway		1 00 2000
Light Company 109, 379, 384 Corney, Butler v 45 Couling v. Coxe 399 Coxe, Couling v 399 Craig and Another v. Lloyd 487 Crockford v. Tucker 542 Cropton, Burmester v 430 Cross v. London Assurance Company 250 Crossfield v. Morrison - 608 Cubitt and Another, Morgan — d. Smith v. Roe 544 — v. Wellsman 179 — d. Woodhouse v. Roe 192 Don, Phillips v 527 Durell, Kearns v 357 East India Company, Clarke and Others v 278 Eastern Counties Railway	Cordon a Universal Gas	
Corney, Butler v 45 Couling v. Coxe 399 Coxe, Couling v 399 Craig and Another v. Lloyd 487 Crockford v. Tucker 542 Cropton, Burmester v 430 Cross v. London Assurance Company 250 Crossfield v. Morrison - 608 Cubitt and Another, Morgan — v. Wellsman 179 — d. Woodhouse v. Roe 192 Don, Phillips v 527 Durell, Kearns v 357 E. East India Company, Clarke and Others v 278 Eastern Counties Railway		d Smith a Ros 544
Couling v. Coxe - 399 Coxe, Couling v 399 Craig and Another v. Lloyd 487 Crockford v. Tucker - 542 Cropton, Burmester v 430 Cross v. London Assurance Company 250 Crossfield v. Morrison - 608 Cubitt and Another, Morgan — d. Woodhouse v. Roe 192 Don, Phillips v 527 Durell, Kearns v 357 E. East India Company, Clarke and Others v 278 Eastern Counties Railway	Light Company 109, 379, 364	
Craig and Another v. Lloyd 487 Crockford v. Tucker - 542 Cropton, Burmester v 430 Cross v. London Assurance Company 250 Crossfield v. Morrison - 608 Cubitt and Another, Morgan Cubit and Another, Morgan Crossfield v. Lloyd 487 E. East India Company, Clarke and Others v 278 Eastern Counties Railway	Corney, Butler v 45	- v. wenshan 179
Craig and Another v. Lloyd 487 Crockford v. Tucker - 542 Cropton, Burmester v 430 Cross v. London Assurance Company 250 Crossfield v. Morrison - 608 Cubitt and Another, Morgan Cubit and Another, Morgan Crossfield v. Lloyd 487 E. East India Company, Clarke and Others v 278 Eastern Counties Railway	Couling v. Coxe 399	— a. woodnouse v. Noe 192
Crockford v. Tucker 542 Cropton, Burmester v 430 Cross v. London Assurance Company 250 Crossfield v. Morrison - 608 Cubitt and Another, Morgan East India Company, Clarke and Others v 278 Eastern Counties Railway	Coxe, Couling v 399	Don, Phillips v 527
Cropton, Burmester v 430 Cross v. London Assurance Company 250 Crossfield v. Morrison - 608 Cubitt and Another, Morgan E. East India Company, Clarke and Others v 278 Eastern Counties Railway	Craig and Another v. Lloyd 487	Durell, Kearns v 357
Cross v. London Assurance Company 250 Crossfield v. Morrison - 608 Cubitt and Another, Morgan Cross v. London Assurance East India Company, Clarke and Others v 278 Eastern Counties Railway	Crockford v. Tucker 542	
Cross v. London Assurance Company 250 Crossfield v. Morrison - 608 Cubitt and Another, Morgan Capture Company, Clarke and Others v 278 East India Company, Clarke and Others v 278 Eastern Counties Railway	Cropton, Burmester v 430	E.
Company 250 Crossfield v. Morrison - 608 Cubitt and Another, Morgan Cubitt and Another, Morgan Company 250 East India Company, Clarke and Others v 278 Eastern Counties Railway		
Crossfield v. Morrison - 608 and Others v 278 Cubitt and Another, Morgan Eastern Counties Railway		East India Company, Clarke
Cubitt and Another, Morgan Eastern Counties Railway	- Family	
		1
v		
	v TIT	Joinpany, Lavien v. 2 Or

Edmonds v. Challis and An-	Grandin v. Maddams - 241
other 581	Grew v. Hill 664 Griffin v. Bradley 394
Edwards and Others v. Law-	Griffin v. Bradley 394
less 105	Griffith, Williams and An-
Licke, Christmas v 156	other v 449
Ellerman, Tibaldi v 71	Groves, Giles and Others v. 146
Ellis v. Peachey,	
Ante, vol. 5, p. 675	
Evans, Bowen v 193	H.
Ex parte Payne,	
Ante, vol. 5, p. 679	Haldane v. Beauclerk - 642
	Halifax and Others v. Lyle 424
	Hall, Gay v. Ante, vol. 5, p. 422 Handley, Waters v 88 Harmer, Garbardi v 481 Harvey v. Dakins - 437
F.	Handley, Waters v 88
	Harmer, Garbardi v 481
Faviell v. Eastern Counties	Harvey v. Dakins 437
Railway Company 54	v. Johnston 120
Fearon v. Norvall,	, Lilley, v.
Ante, vol. 5, p. 445	Ante, vol. 5, p. 648
Filbee v. Hopkins 264	Hayter and Another v. Fish 355
Fish, Hayter and Another v. 355	Henderson and Another,
Fisher, Astley v 376	Dearie and Others v 552
Foster v. Tattersall note (a) 537	Hewlett, Walker and Another
v. Temple,	v 732 Hill, Grew v 664
Ante, vol. 5, p. 655	Hill, Grew v 664
Freeman and Another v.	Hoare v. Dickson 577
Cooke 187	Holmes v. London and South
v. Rosher 517	Western Railway Co 536 Hopkins, Filbee v 264 Hopwood v. Whaley - 342 Horn v. Thornborough - 651
Freemantle and Others,	Hopkins, Filbee v 264
Adams and Another v 10	Hopwood v. Whaley 342
Futvoye v. Stevens 440	Horn v. Thornborough - 651
	Howard and Another v.
_	Oakes 230
G.	Howden v. Standish 312
	Humphries v. Longmore and
Galot, Mercy v 656 Gandell, Ross v 698 Gannon, Sargent v 691	Smith 128
Gandell, Ross v 698	Hunter, Braham v 129
Gannon, Sargent v 691	Hunter, Braham v 129 Hutt v. Morell 447 Hyde, Jacobs v. note (b) 8
Garbardi v. Harmer - · 481	Hyde, Jacobs v . note (b) 8
Gascoigne, White v 225	
Gay v. Hall, Ante, vol. 5, p. 422	I.
and Another v. Lander 75	•
Geiger, Young v 337 Gell v. Burgess 547	Ingleby and Another, Gra-
Gell v. Burgess 547	ham and Another v 13
Giles and Others v. Groves 146	In re Angell 144
Graham v. D'Arcy 385	In re Angell 144
Graham and Another v.	Milliard 86
Ingleby and Another - 13	Wood 154

J.	Lloyd, Craig and Another v. 487 —— and Spittle, In re - 531 Lomax v. Landells 396
Jacobs v. Hyde note (b) 8 James, Richards v 52 Jeffreys v. Beart,	London Assurance Com- pany, Cross v 250 and North Western
Ante, vol. 5, p. 646 Johnson, Bank of England v 458	Railway Company v. Quick Ante, vol. 5, p. 685 and South Western
v. Ward - 720 Johnston, Harvey v 120 Jones v. Boxer - 574	Railway Co., Holmes v. 536 Longmore and Smith, Humphries v 128
v. Owen, Ante, vol. 5, p. 669	Louch, Doe d. Harrison and Another v 270
v. Pritchard 529 v. Smith 9 and Another, Clutter-	Lyle, Halifax and Others v. 424
buck v 251	M.
к.	M'Dowall v. Boyd 149 M'Gregor v. Keiley 635 M'Lean v. Phillips 697
Kearns v. Durell - 357 Keiley, M'Gregor v 635	Maddams, Grandin v 241 Mailé v. Mann 42 Maltass, Cunliffe and An-
Kepp and Another v. Wiggett and Others - 96	other v 723 Mangnall and Another, Peat
Knipe, Byrne v. Ante, vol. 5, p. 659	v 261 Mann, Mailé v 42 Manwell v. Thompson and Others 91
L.	Marsack, Smith v 363 Martin and Others, Thris-
Lancashire (Justices of), Reg. v. Ante, vol. 5, p. 435 Landells, Lomax v 396 Lander, Gay and Another v. 75	cutt v 489 Matthews, Stratton v 229 Mercy v. Galot 656 Metropolitan Live Stock
Lawless, Edwards and Others v 105	Company, Turner v 59 Sewage Com-
Leader and Another v. Purday 408 Leslie v. Richardson - 91 Levy, Connop and Another v 282	pany, Moore v 496 Miles, Williams v 433 Miller, Bardell v 721 Milliard, In re 86 Moore v. Metropolitan Sew-
Lilley v. Harvey Ante, vol. 5, p. 648	age Company 496 Morell, Hutt v 447 Morgan v. Cubitt and An-
Lister, Savery v 257 Little, Robinson v 246	other 444

TABLE OF THE CASES. VII			
Morrison v. Chadwick - 567	Peat v. Mangnall and An-		
——— Crossfield v 608	other 261		
Morse, Regina v 224	Peninsular, &c. Steam Boat		
•	Company, Benett v 387		
	Perry, Wood v 194		
N.	Peterborough (Justices of),		
Nach - Rooms 200	Regina v 512 Peterson and Another v.		
Nash v. Brown 329 Nathan v. Story 259			
Nathan v. Story 259 Naylor and Another, Whar-			
	Peyton, Bletchingdon (The		
37 4 045	Surveyors of) v 289		
Ness v. Angas 645	Pilkington v. Riley and Others 628		
Newington, St. Mary (Go-			
vernors of), Regina v 162	Pitts v. Stephens 157		
Newman, Woodhams v 683	Phillips v. Don - 527		
Newton v. Boodle and	— M'Lean v 697		
Others 351, 352	Place v. Campbell 113		
Nicholson, Wynn v 717	Platell v. Bevill 2		
Norton v. Walker 204	Pratt v. Pratt and Others 20		
Norvall, Fearon v.	Price, Darrington v 114		
Ante, vol. 5, p. 445	Pritchard, Jones v 529		
Nunn v. Claxton 637	Pritchett v. Smart 702		
	Purday, Leader and An-		
	other v 408		
О.			
Oakes, Howard and Another	Q.		
<i>r.</i> 230			
Owen, Jones v.	Quick, London and North		
Ante, vol. 5, p. 669	Western Railway Co. v.		
v. Pearse	Ante, vol. 5, p. 685		
Ante, vol. 5, note (c), p. 654			
	R.		
P.			
	Rawlings, Sutton v 673		
Palmer, Yates v 283	Reece, Smith v., In re - 520		
Patten, Belcher and Others	Reed v. Shrubsole 707		
v 370	Regina v. Basingstoke (In-		
Payne, Ex parte	habitants of) 308		
Ante, vol. 5, p. 679	v. Berkshire (Jus-		
Peachey, Ellis v.	tices of) 507		
Ante, vol. 5, p. 675	v. Bishop 499		
Pearse, Owen v.	v. Cumberland (Jus-		
Ante, vol. 5, note (c), p. 654	tices of) Ante, vol. 5, p. 430		
Peart v. Universal Salvage	v. Lancashire (Jus-		
Company 322	tices of) Ante, vol. 5, p. 435		
ONN	1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1		

Regina v. Morse 224	Smith v. Marsack 363
- v. Newington, St.	v. Reece, In re - 520
Mary (Governors of) - 162	and Another v. Troup 679
n Patarharaugh (Ing	Soames and Another v.
tices of) 512	Cooper 238
— v. Robinson - 295	Spittle and Lloyd, In re - 531
v. Surrey (Justices	Standish, Howden v 312
of) 735	
Regula Generalis (E. T. 11	Stevens, Futvoye v 440
Vict.) 1	Stilwell v. Clarke 436
(T. T.	Story, Nathan v 259
11 Vict.) 176	Stratton v. Matthews - 229
(M. T.	Sturgis, Welchman v 739
12 Vict.) 178	Stutton v. Bament 632
(E. T.	Suffield, Lord, Richards v. 22
12 Vict.) 627	Surrey (Justices of), Regina
Richards v. Bluck - 325, 334	v 735
Richards v. James 52	Sutton v. Rawlings 673
v. Suffield, Lord 22	Symonds v. Dimsdale - 17
Richardson, Leslie v 91	
Riley and Others, Pilking-	
ton v 628	Т.
Robinson v. Little 246	1 **
	Tattersall, Foster v. note (a) 537
Roe, Doe d. Marks and An-	Temple, Foster v. note (a) 337
other v 87	
— Doe d. Smith v 544	Ante, vol. 5, p. 655
	Thompson, Caunt v 621
	and Others, Man-
Rosher, Freeman v 517	well v 91
Ross v. Gandell 698	v. Universal Sal-
- v. York, &c., Railway	vage Company 465
Co. Ante, vol. 5, p. 695	Thornborough, Horn v 651
	Thriscutt v. Martin and
	Others 489
S.	Tibaldi v. Ellerman 71
	Townsend and Another v.
Sargent v. Gannon 691	Deacon 659
Savery v. Lister 257	Troup, Smith and Another
Schmidt, D'Ebro v 742	v 679
Scott, Dodgson v 27	Tucker, Crockford v 542
Showler, Chaplin and An-	Turner, Bailey and Another
other v 227	790
Shropshire Union Railway	
Co. v. Anderson 483	Stock Company 59
Shrubsole, Reed v 707	—— and Others v. Deane
Smart, Pritchett v 702	and Another 669
Smith, Jones v 9	una monter
Dunen, vones v	
,	

¥ĭ	1 317 1 TO 11
U.	Wigley, Dodd v 558
	Wilkinson v. Willats - 280
Universal Gas Light Com-	Willats, Wilkinson v 280
pany, Corden v. 109, 379, 384	Willes and Others, Doe d.
Salvage Company,	Poole v 253
Thompson v 465	
Salvage Company,	v. Miles 433
Peart v 322	and Another v.
2 04.1 01	Griffith 449
	Woodhams v. Newman - 683
w.	Wood, In re 154
***	Wood, 2876 104
TT 11 N	v. Perry 194
Walker, Norton o 204	- 7
—— - and Another v.	Company 606
Hewlett 732	Wrench and Others, Daw-
Ward, Johnson v 720	son v 474
Waters v. Handley 88	Wynn v. Nicholson 717
Webster v. Delafield - 597	
Welchman v. Sturgis - 739	1
Wellsman, Doe v 179	Υ.
	1
Wharton and Another v.	77 . D.1
Naylor and Another - 136	Yates v. Palmer 283
White, Clossman v 563	York, &c., Railway Com-
v. Gascoigne - 225	pany, Ross v.
Wiggett and Others, Kepp	Ante, vol. 5, p. 695
and Another v 6	Young v. Geiger 337

ERRATA.

Ante, vol. 1, p. 841, line 1, for "insufficient," read "sufficient."
Ante, vol. 2, p. 203, marg. note, line 13, for "plaintiffs," read "defendants."
Page 253, marg. note, line 2, for "tenant," read "defendant."
Page 702, marg. note, line 3, dele "joint."
Page 430, marg. note, line 10, for "c. 14," read "c. 46."
Page 730, marg. note, line 28, for "was," read "were."

	•		
		•	

REGULA GENERALIS.

EASTER TERM, 11 VICT.

"It is ordered, that no subpœnâ duces tecum be issued for enforcing the production of any record of the acts of any Court, deposited in the Public Record Office, pursuant to the statute 1 & 2 Vict. c. 94, or any other document or minute of proceedings officially filed of record in any Court, and deposited in the Public Record Office, pursuant to the said statute; without an order of the Court out of which the said subpænâ shall issue, or of some Judge thereof."

(Signed) DENMAN, T. COLTMAN,
THOS. WILDE, R. M. ROLFE,
FRED. POLLOCK, WM. WIGHTMAN,
J. PARKE, T. J. PLATT.
J. PATTESON,

REPORTS OF CASES

DETERMINED ON

POINTS OF PRACTICE.

COURT OF EXCHEQUER.

Crinity Cerm.

IN THE ELEVENTH YEAR OF THE REIGN OF VICTORIA.

1848.

A final order for protection from process, obtained by an insolvent under the 7 & 8 Vict. c. 96, operates not only as a protection to the person of the insolvent, but as an absolute bar to an action for

PLATELL v. BEVILL.

DECLARATION in debt containing the usual money counts.

That after the accruing of the said debts and causes of action in the said declaration mentioned, and after the passing of an act of Parliament, passed, &c., (5 & 6 Vict. c. 116), and before the passing of a certain other act of Parliament, passed, &c., (7 & 8 Vict. c. 96), and before the commencement of this suit, to wit, on the

the debts as to which it is a protection.

To an action in debt the defendant pleaded, that after the accruing, &c., and after the passing To an action in debt the defendant pleaded, that after the accruing, &c., and after the passing the 5 & 6 Vict. c. 116, and before the passing the 7 & 8 Vict. c. 96, and before the commencement of the suit, to wit, on, &c., a petition for the protection of the defendant from process was duly, and according to the form of the statute, &c., presented by the defendant to the Court of Bankruptcy, and filed in the said Court; that before the commencement of the suit, and after the passing of the secondly mentioned act, to wit, on, &c., a final order for protection and distribution was made in the matter of the said petition by J. E., Esq., a commissioner of the said Court of Bankruptcy duly authorized in that behalf; and that the debts, &c., accrued before the date of filing of the said petition in the said Court of Bankruptcy: Held, on special demurrer, that the plea was good in form as well as substance. that the plea was good in form as well as substance.

22nd day of July, A.D. 1844, a petition for the protection of the defendant from process was duly, and according to the form of the statute in such case made and provided, presented by the defendant to her Majesty's Court of Bankruptcy, and afterwards, to wit, on the day and year aforesaid, filed in the said Court; and thereupon afterwards, and before the commencement of this suit, and after the passing of the said secondly mentioned act, to wit, on the 26th day of September, A.D. 1844, a final order for protection and distribution was made in the matter of the said petition by Joshua Evans, Esq., a commissioner of the said Court of Bankruptcy duly authorized in that behalf: and that the said several debts and causes of action in the declaration mentioned, and each and every of them, and every part thereof, accrued before the date of the said filing of the said petition in the said Court of Bankruptcy. Verification.

Special demurrer, assigning for causes that the plea was not in the form authorized by the statute: that the proceeding of the Court in the matter of the said petition, and the final order of the commissioner, were not averred in the plea to have been entered of record: that the plea did not shew that the final order was signed by the commissioner: that the plea should have shewn who was protected by the order, and what was thereby ordered to be distributed: that the plea ought to have shewn the form of the order: and that after the passing of the statute 7 & 8 Vict. c. 96, the commissioner had no power to make an order which would be a bar to the action.

Joinder in demurrer.

Butt, in support of the demurrer (a). The plea is bad in substance. Since the 7 & 8 Vict. c. 96, an order under that act only protects the person, and, therefore, cannot be pleaded in absolute bar of the action. The case of

PLATELL 5. Bevill.

(a) In Easter Term, 1848.

PLATELL BEVILL. Toomer v. Gingell (a) is an authority that an order for protection under the late act protects the person only of the insolvent from process. But if the Court should be of opinion that the 5 & 6 Vict. c. 116, s. 10, is still in force, and that such an order is a good bar to the action, the plea is defective in point of form. He referred to Gillan v. Deare (b); Lewis v. Harris (c); Cook v. Henson (d); Tyler v. Shinton (e).

Ring, contrà, was stopped by the Court.

PARKE, B.—We are all of opinion, that upon the authority of *Cook* v. *Henson*, this plea is, in point of form, sufficient. We will take time to consider whether we will hear the defendant's counsel on the other point.

Cur. adv. vult.

ROLFE, B., now delivered the judgment of the Court. (After stating the pleadings, his Lordship proceeded thus):
—In the course of the argument, the Court intimated its opinion that the plea was sufficient in form, and stated all that by the statute 5 & 6 Vict. c. 116, s. 10, was required to constitute a good defence.

The only remaining question was, whether the final order, obtained under the 7 & 8 Vict. c. 96, constitutes an absolute bar to an action for the debts as to which it is a protection, or operates only as a protection to the person of the insolvent; in which latter case it ought not to be pleaded as an absolute bar, but specially in bar of execution against the person only. We are of opinion that it is an absolute bar, and, consequently, our judgment must be for the defendant.

```
(a) Ante, vol. 4, p. 182; S. C.
```

Vacation, 1848.

³ C B. 322.
(b) Ante, vol. 3, p. 412; S. C.

⁽d) 1 C. B. 908; S. C. ante, vol. 3, p. 177.

² C. B. 309.

⁽e) 8 Q. B. 610.

⁽c) Queen's Bench, Hilary

We have to construe the provisions of two acts of Parliament, which are by no means clearly expressed, especially the latter, the wording of which, particularly of the form given in the schedule for the order of protection, is likely to mislead the reader; but on a careful consideration of the clauses of both acts, we think the intention of the Legislature is sufficiently plain, and that there is no difference in the legal effect of the final order given under the second, from that given under the first act, as to the discharge of the insolvent. In both, we are of opinion that it constitutes an absolute bar to the actions in respect of which it is a protection, as it is admitted it did under the first act.

The latter act terms the final order as one made "under the provisions of the said act, as amended by this act;" section 22. The section then proceeds to define from what debts the person is to be protected (adopting the language of the old Insolvent Act, 7 Geo. 4, c. 57, s. 46); and directs the form in the schedule to be followed: but the power of making the final order arises from the former act, except so far as it is varied by the latter. Section 74 of the latter act directs that nothing therein contained shall be construed to repeal, affect, or in any manner alter the provisions of the 5 & 6 Vict. c. 116, "except so far as herein above expressly provided, and except so far as the provisions of the said recited act may be inconsistent with, or at variance with, the provisions of this act." Now, the latter act does make certain express alterations; it provides a more easy way of petitioning for the protection from process in the first instance (which petition is still to be under the former act); for it dispenses with notice in the Gazette, &c. It also provides for the appointment of the creditors' assignee, and the vesting of the estate in him by the appointment prior to, or at least independently of, the final order; whereas, under the former act, the creditors' assignee had not the estate vested in him until the final order, which, by section 4, was to be for the protection of the person of the insolvent, and vesting the

PLATELL 5. Bevill. PLATELL v.
Bevill.

estate in the creditors' assignee, and also in the official assignee to be named by the commissioner. An alteration is made in the effect of the assignment to the official and creditors' assignee, by section 11, by vesting powers in them; and by section 17, by vesting in them goods in the apparent ownership of the insolvent: but with respect to property acquired after the final order, no alteration seems to have been made.

By the first act, on the passing of the final order, all the estate, present and future, of the insolvent vests in the assignee, as under a fiat; but then by section 9, the assignees must file a claim, in order to take after acquired effects, and cannot take possession but by an order from the commissioner or the Court of review; so that both sections being read together, it seems that the assignees take all present property absolutely, and have a right to obtain all that is subsequently acquired by the insolvent. This is the only way of reconciling these contradictory clauses.

The 4th section, explained by the 73rd section, leaves no doubt on this question under the second act; for the appointment vests the property of the insolvent; that is, all present and future estate which shall come to him "before he shall have obtained the final order;" leaving all subsequently acquired property to be dealt with under the former act; for the 9th section of that act is certainly not repealed.

In our view, the rights of the assignees to after acquired property are the same under both acts. The alterations above noticed, and others, are made by the 7 & 8 Vict. c. 96; but that statute makes no alteration in the effect of the order as a defence, at least no express alterations; and it leaves the 10th section, which gives the defence, unrepealed. Nor is there any enactment in the new statute which is inconsistent with the provision that the final order should constitute a sufficient plea in bar; and, therefore, by the 74th section, that provision must be in full force.

If the former act had vested all subsequently acquired property in the assignees, and the latter had altered this, there would have been ground for the implication that the Legislature meant to do away with the absolute defence given by the 10th section, and to leave the creditors to take the remedies against subsequently acquired property by fieri facias. But we think the rights of the assignees to after acquired property are not affected, and, consequently, that such implication does not arise; and there is, therefore, no inconsistency or variance between the first and second act in this respect, to authorize us to reject the 10th section as being impliedly repealed by the new act.

The form given by the schedule, it is true, protects expressly the person only; and the giving such a form is, no doubt, an incautious mode of legislating, and is calculated to mislead; but then the final order, directed by the first act, is no more than an order of protection of the person. Section 4 says the order shall be called a final order, and shall be for the protection of the person from process, and for vesting of the estate, which latter operation is now otherwise provided for; but its effect as a measure of protection is only in terms for the protection of the person; not a word is directed to be introduced that imports any protection but that of the person in the order itself. The privilege of pleading it in bar arises entirely from the 10th section, which describes the legal effect of such an order as "an order for protection and distribution;" a very inaccurate expression, no doubt, for there is nothing in the order as required by the first act in general terms, and particularly in the schedule to the second act, which takes notice of a distribution, or requires it. The final order under the second act is not an order for distribution; but neither was the final order required by the first act; and if the 10th section allows the order to be pleaded in inapposite terms, the same direction must be followed as to that required by the second, and it may also be pleaded in the same inapposite terms.

PLATELL 9. BEVILL PLATELL v.
Beville

Considering the two acts together as one system, we see no reason to suppose that the Legislature, which clearly meant to give facilities to the debtor to obtain his discharge, intended also to limit the operation of that discharge under the new act; all his property, present and future, being disposed of for the benefit of creditors in the same way in both acts. We think that the legal effect of the discharge is the same in both acts, and that the effect inartificially described in the 10th section belongs just as much to an order under the second as under the first act.

This view of the two acts differs from that which my Brother Maule is reported to have taken in the case of Toomer v. Gingell (a). The question in that case was not fully argued, the learned counsel for the defendant having, after taking time, acted upon the impression as to the meaning of the second act, which its language is, at first sight, so likely to create, and abandoned the argument. Upon the best consideration we can give to these acts, we think that the impression was a wrong one, and that the effect of the final order is the same under both acts.

Judgment for the Defendant (b).

(a) Ante, vol. 4, p. 182.

(b) There was a case of Jacobs v. Hyde, where a similar plea had been pleaded, and at the trial an order for protection under the 7 & 8 Vict. c. 96, was offered in support of it. The Chief Baron held that the issue was not proved, and a rule being obtained for a new trial on the ground of misdirection, the case was argued in

Easter Term last by Humfrey and Humter on behalf of the plaintiff, and Hake on the part of the defendant. The Court took time to consider their judgment; and after giving judgment in the above case, said that the judgment in the above case disposed also of the case of Jacobs v. Hyde, and that the rule in that case, therefore, must be absolute.

1848.

JONES v. SMITH.

MARTIN moved for a rule calling upon the plaintiff Evidence to shew cause why the verdict in this case should not be to the amount set aside, and a nonsuit entered instead thereof; on the of damages, is material eviground that the plaintiff had failed to comply with his dence within undertaking to give material evidence in the county of of the under-Middlesex.

It appeared that this was an action on the case for the venue to negligence of the defendant, whereby the plaintiff's arm which it was was broken; and special damage was alleged that the plaintiff thereby became unable to pursue his profession as an attorney at Dolgelly, in Merionethshire. The venue was laid in Middlesex, and the defendant, on the usual affidavit, removed it to Merionethshire, from whence the plaintiff brought it back to Middlesex, on entering into the usual undertaking to give material evidence in the latter county. The only evidence given within the county of Middlesex was the production of the roll on which the plaintiff was admitted an attorney. There was no proof of any damage having been sustained by the plaintiff, as attorney. The Judge before whom the cause was tried, held that this was a sufficient compliance with the undertaking, but gave the defendant leave to move to enter a nonsuit.

The production of the roll was not "material" evidence within the meaning of the undertaking; unless all relevant evidence is to be held material. was not bound to prove he was an attorney in order to maintain the action, and there was no proof of any damage to him as attorney. Besides, in order to recover damages from his loss of practice as an attorney, it was not necessary to shew he was an admitted attorney. The defendant, who was a wrong doer, could not take any advantage of his not

taking, on originally laid. JONES 5. SMITH. being upon the roll. There is a case of Greenway v. Titchmarsh (a), where evidence bearing on the amount of damages is said to be material within the meaning of the undertaking, but there the evidence was of a payment which formed part of the damages. [Alderson, B.—If the attorney could not recover his demand as against his client, it would make his practice of so much less value. Parke, B.—You cannot get out of the difficulty that it is evidence as to the quantum of damages; and although perhaps it goes to the extreme verge of the rule, I think it is material evidence within the meaning of the undertaking.]

PER CURIAM.

Rule refused.

(a) 7 M. & W. 221; S. C. 9 Dowl. 279.

In re an action in the Court of Common Pleas,
Between Adams and Another, Plaintiffs,
and

FREEMANTLE and Others, Defendants.

Where a vessel was taken by custom house officers for an alleged breach of the Foreign Enlistment Act, and after being detained some time, was released unconditionally, and proceeded on her voyage, and the owners afterwards

THE Attorney General moved that the action between the above parties in the Court of Common Pleas be removed out of that Court into the office of pleas in this Court, under the following circumstances.

The Attorney General had no affidavit in support of his motion, but stated the facts as Attorney General. It appeared that the above action was brought by the plaintiffs as registered owners of a ship named the Black Cat against the defendants, who were custom house officers, for an

brought an action in the Court of Common Pleas against the custom house officers for the alleged trespass in so seising and detaining her: this Court, on motion of the Attorney General, and upon his statement without affidavit, removed the action into this Court, on the ground that the revenue of the Crown might be affected by it.

alleged trespass in seizing and detaining that vessel. The vessel had been cleared out at the Custom House in the usual way, on the 22nd of January, 1848, with a cargo of arms and military accourrements for Gibraltar. She was afterwards seized by the defendants for an alleged contravention of the Foreign Enlistment Act; but after being detained some time, she was released unconditionally, and proceeded on her voyage. About two months afterwards the present action was brought. Notice had been given by the solicitor to the customs that counsel on behalf of the Crown and of the defendants would make the present motion.

ADAMS and Another v.

FREEMANTLI and Others.

Greenwood shewed cause. A motion of this kind, which is made upon the ground that the revenue of the Crown is affected by the action, ought to be supported by an affidavit that such is the fact. In The Attorney General v. Hallett (a) it is true there was no such affidavit, but there it appeared upon the pleadings that the revenue of the Crown was affected. In Manning's Exch. Pract., p. 194, 2nd ed., it is laid down, that "where the state of the pleadings sufficiently discloses the question intended to be raised, no affidavit of a motion to remove the proceedings seems to be necessary. In other cases an affidavit is required, from which it must appear that the matters in dispute relate to the revenue." [He referred to Anon. (b); In re Kingsman (c); Beningfield v. Stratford (d); The Attorney General v. Kingston (e).

PARKE, B.—The Court always gives the Attorney General credit for stating the truth.

[The Attorney General here stated that he had an affidavit of the truth of the facts if the Court had thought it necessary that he should use it.]

```
(a) 15 M. & W. 97; S. C. (d) 8 Price, 584.

(ante, vol. 3, p. 685. (e) 8 M. & W. 163; S. C.

(b) 1 Anstr. 205. 1 Dowl. 358, N. S.

(c) 1 Price, 206.
```

ADAMS and Another v. FREEMANTLE and Others.

Greenwood. Taking the facts to be as stated, they do not shew that the revenue of the Crown is affected. The ship and cargo were delivered up unconditionally; and, however, during the time they were detained for a supposed breach of the law, the revenue may have been affected; it cannot be so now that they have been released unconditionally. It was held in a case reported in a note to Bereholt v. Candy (a), that this Court would not remove an action against an officer of the customs for removal of a ship, where a verdict had been found for the defendant in an information against the owner, as the Crown could no longer have any interest in the matter. [He referred to Bishop v. Warner (b), and Cawthorne v. Campbell (c).]

The Attorney General, in reply, was stopped by the Court.

Pollock, C. B.—I have no doubt about the matter. The cause, in my opinion, should be removed into this Court.

PARKE, B.—There is nothing to shew in this case that the vessel was not forfeitable at the time of its seizure; and, if so, that it may not be liable to forfeiture even now. If it had been decided that it was not forfeitable, then the case in *Bunbury* would be in point; but that case is by no means an authority that if the Crown chooses to relinquish its claim to a thing forfeited, and an action afterwards be brought in respect of it, the cause may not be removed into this Court.

ROLFE, B.—The giving up the vessel to the owners amounts to the same thing as if the Crown had given it to a third party; and in that case it could not be contended

⁽a) Bunbury, 34.

⁽c) 1 Anstr. 205, n.

⁽b) Hardres. 193.

that the revenue might not be affected by an action brought for the alleged trespass in taking her.

1848. ADAMS and Anoth FREEMANTLE

and Others.

PLATT, B., concurred.

Rule absolute.

GRAHAM and Another v. Inglesy and Glover.

DECLARATION in debt, containing the usual money To a declaracounts.

Plea, by the defendant Glover. That before and at the pleaded that he was an time of the commencement of the suit, he the defendant attorney of Glover was, and from thence hitherto hath been and still is, Queen's Bench, one of the attorneys of the Court of our Lady the Queen, before the Queen herself, at Westminster, in the county of that he was not Middlesex; and hath prosecuted and defended, and still the Court of doth prosecute and defend, divers suits and pleas in the The plaintiffs said Court before our Lady the Queen herself, for divers the defendant liege subjects of our said Lady the Queen as their attorney; that he the defendant Glover, and all others, the attorneys of Exchequer. of the said Court of our Lady the Queen, before the Queen the country: herself, prosecuting and defending suits and pleas for their clients in that Court, ought by an ancient and laudable that the replicustom from time immemorial used and approved according for not conto the laws and customs of this realm, and the liberties and privileges of the said Court of our Lady the Queen, before by the record. the Queen herself, to be free and exempt from being compelled against their will, and have not, nor hath any or either of them, at any time or times whatsoever, hitherto been used or accustomed to be compelled to answer any plea or plaint in any action personal (pleas of freehold, felony, and appeals only excepted), before any justice or minister of our Lady the Queen or other Judges whomsoever, in any Court whatsoever, except before the justices of our said Lady the Queen of the said Court of our Lady

the defendant the Court of and privileged an attorney of Exchequer was an attorney of the Court Held, on special demurrer cation was bad. cluding with a verification

GRAHAM and Another v. INGLEBY and Another.

the Queen, before the Queen herself at Westminster aforesaid; that the said other defendant Ingleby, before and at the time of the commencement of this suit, was, and from thence hitherto hath been and still is, one of the attorneys of the said Court of our said Lady the Queen, before the Queen herself at Westminster aforesaid; and hath prosecuted and defended, and still doth prosecute and defend, divers suits and pleas in the same Court before our Lady the Queen, for divers other liege subjects of our said Lady the Queen, as their attorney; that at the commencement of this action, he, the defendant Glover was not, nor was the said defendant Ingleby, nor hath either he or the said defendant Ingleby ever been an attorney, officer, or minister of the said Court of our Lady the Queen, before the Barons of her Exchequer at Westminster. And this the defendant is ready to verify, wherefore he prays judgment if the said Court of our Lady the Queen, before the Barons of her Exchequer, at Westminster, will and ought to take cognizance of the said plea.

Replication. That at the commencement of this action, the defendant Glover was an attorney, officer, and minister of the said Court of our Lady the Queen, before the Barons of her Exchequer at Westminster; and this the plaintiffs pray may be inquired of by the country, &c.

Special demurrer. That the replication ought not to have concluded to the country, and that the same ought to have concluded with a verification by the record.

Joinder in demurrer.

Martin, in support of the demurrer. The replication is bad for concluding to the country instead of to the record. The case of Forster v. Cale (a) is directly in point. There the pleadings were the same as in the present case, and the Court held the replication bad, saying, "the plaintiff should have concluded to the record, for no man can be an attorney

but by the act of the Court, and that act must appear by the record, for we will not go to a jury to inquire into our own act." To the same effect is the case of Barker v. Forrest (a). [Alderson, B.—The replication is in effect a traverse of that part of the plea which alleges that the defendant is not an attorney of this Court. If no proof were offered at the trial, would not the plaintiffs be entitled to the verdict on this issue? No, the gist of the defence set up by the plea is the privilege to be sued in the Queen's Bench by virtue of being an attorney of that Court. defendant is not bound to allege that he is not an attorney of this Court; for that is a negative, and he could not It should come from the plaintiff, as in the present instance, by way of replication; and the burden of proof is upon him to shew it, by producing the record. The case of *Percival* v. Cooke (b) is an authority that this allegation in the plea is immaterial; but the forms in some of the books of precedents contain it; 3 Chit. on Plead. 715, 6th ed., which is probably the reason why it has been inserted here. [Platt, B., referred to Walford v. Fleetwood (c).]

GRAHAM and Another v.
INGLEBY and Another

Cowling, contrà. It is submitted that the replication properly concludes to the country; Doctr. Plac. pp. 284, 5; Dillon v. Harper (d); Scawen v. Garret (e). The case of Percival v. Cooke does not decide that the allegation in the plea that he is not an attorney of this Court is immaterial; but only that it need not be inserted. Walford v. Fleetwood only decides that the allegation may come by way of new matter from the plaintiff in his replication. Where it is alleged in the plea, as in the present case, the proper course for the plaintiff to take is to join issue on it, and conclude to the country. The production of the record is not the only way of proving that a party is an attorney. The pro-

⁽a) 1 Stra. 532. ante, vol. 3, p. 65. (b) 5 M. & W. 293; S. C. 7 (d) 2 Salk. 545. Dowl. 500. (e) Ibid; S. C. 2 Ld. Raym. (c) 14 M. & W. 449; S. C. 1172.

GRAHAM and Another v. Inglesy and Another.

duction of the Stamp Office certificate, countersigned by a Master of the Court of Queen's Bench, was held to be sufficient primâ facie evidence to satisfy an allegation that the party was an attorney of that Court; Sparling v. Haddon (a); Rex v. Crossley (b). [He referred also to Rastrich v. Beckwith (c).]

Martin, in reply. The cases of Dillon v. Harper (d), and Scawen v. Garret (e), only tend to shew that the plea in the present form is right; and in both cases it seems to have been taken for granted by the Court that the mode of trying whether a defendant is an attorney or not, is by production of the record.

Pollock, C. B.—All that the cases cited by Mr. Cowling establish is, that when you seek to prove collaterally that a party is an attorney, you may do so in any way which will satisfy a jury of the fact; and then the rule of law applies that to prove that a party holds a particular employment, you may shew that he performs the duties of it.

Cowling here prayed leave to amend.

Pollock, C. B.—I was about to state my opinion, and I believe that of the rest of the Court, that the replication was bad; but the plaintiffs may have leave to amend, otherwise there must be judgment for the defendant.

Leave to amend.

(c) 7 M. & G. 905; S. C. ante, 1172.

⁽a) 9 Bing. 11; S. C. 2 M. & vol. 2, p. 624; 8 Scott, N. R. 716. Scott, 14.
(b) 2 Esp. 526.
(c) Ibid; S. C. 2 Ld. Raym.

1848.

SYMONDS v. DIMSDALE.

THIS was a rule calling upon the defendant to shew A Judge has cause why a writ of certiorari, issued pursuant to leave the 90th secgranted by a learned Judge at Chambers, to remove an action between the above parties from the County Court c. 95, (County Courts' Act), of Oxfordshire, into this Court, should not be set aside.

It appeared upon the affidavits, that a plaint had been brought in the County Court of Oxfordshire, in the month of May, 1848, by the above named plaintiff, who was a tradesman in Oxford, against the defendant, to recover an amount of 131. alleged to be due for the hire of horses and gigs, supplied to the defendant, whilst a resident undergraduate of the University. The defendant, pursuant to the 9 & 10 Vict. c. 95, s. 76, gave notice to the plaintiff that he meant to set up the defence of infancy. The plaintiff thereupon, on the 23rd of May, served the defendant with a notice that he intended to try the cause by jury, on the 26th. The 24th was the Queen's birthday, and, consequently, the law offices were closed, and there was no Judge at Chambers on that day. Early on the 25th, however, the defendant applied to a learned Judge at Chambers to order a certiorari to be issued, to remove the cause from the County Court into this Court, on the ground that a defence of infancy would not be fairly tried by an Oxford jury. The Judge made an order accordingly, and the writ was issued and served on the morning of the 26th, before the trial. The proceeding before the Judge to obtain the certiorari was entirely ex parte, and no notice of the intended application had been given to the plaintiff. The present rule having been then obtained, on the ground that a Judge at Chambers had no right to grant a certiorari under the 9 & 10 Vict. c. 95, s. 90, on an ex parte application, without notice having been given to the opposite party, so that he might be heard if he should think fit;

tion of the 9 & 10 Vict. to order a writ of certiorari to issue, upon an ex parte application.

D. & L. VOL. VI.

SYMONDS

DIMSDALE.

Whateley and Barstow shewed cause.

[The Court desired the defendant's counsel to confine themselves to the question of whether the Judge had power to grant the certiorari on an ex parte application; as they were of opinion that there was sufficient ground for issuing the writ, and for dispensing with notice to the other party, if the Judge had power under any circumstances to dispense with notice.]

Whateley and Barstow. The question then is, what is the construction to be put upon the 90th section of the 9 & 10 Vict. c. 95. That section enacts, "that no plaint entered in any Court holden under this act, shall be removed or removable from the said Court into any of her Majesty's superior Courts of record by any writ or process, unless the debt or damage claimed shall exceed 5L, and then only by leave of a Judge of one of the said superior Courts, in cases which shall appear to the Judge fit to be tried in one of the superior Courts, and upon such terms as to payment of costs, giving security for debt or costs, or such other terms as he shall think fit." The act savs nothing about any notice being given to the opposite party of the intended application; and great inconvenience would ensue if the construction were put upon it, that in no case could such notice be dispensed with. No inconvenience would result from a contrary construction of the act, as the granting the writ is solely in the discretion of the Judge, who might, if he thought fit, require that where no notice had been given, some reason should be afforded for the omission; for the very words of the act empower him to impose "such terms" "as he shall think fit." A writ of certiorari at common law is a writ of right; Landens v. Shiel (a); and always issues on an exparte application.

A somewhat similar writ, a habeas corpus cum causâ to remove a cause from the Palace Court also issues ex parte; and even a capias under the 1 & 2 Vict. c. 110, s. 3, which affects the liberty of the subject, issues without any notice to the defendant.

SYMONDS

b.

DINSDALE.

Keating, in support of the rule. A discretion as to issuing the writ is vested in the Judge by the terms of this section; and he cannot exercise that discretion according to the principles of justice and reason, unless he hears what the opposite party may have to object to the writ being issued. Many cases may be supposed, in which considerable prejudice might arise to the plaintiff from the writ being issued. In the present case, the plaintiff will lose all the costs which he has expended in the proceedings in the County Court, which have now become useless.

Cur. adv. vult.

Pollock, C. B., delivered the judgment of the Court.— The question in this case depends upon the true construction of the 90th section of the Small Debts Act.

That section enacts, "that no plaint entered in any Court holden under this act shall be removed or removable from the said Court into any of her Majesty's superior Courts of record by any writ or process, unless the debt or damage claimed shall exceed 5L, and then only by leave of a Judge of one of the said superior Courts, in cases which shall appear to the Judge fit to be tried in one of the superior Courts, and upon such terms as to payment of costs, giving security for debt or costs, or such other terms, as he shall think fit."

The question is, whether the latter words, "as he shall think fit," necessarily import that the Judge should have both parties before him in order that he may be in a situation to exercise his discretion. We are all of opinion SYMONDS

5.

DIMSDALE.

that they do not, and that the writ may issue ex parte, if the Judge is satisfied that it ought to do so.

In general, the writ of certiorari is the right of the subject at common law, and though it is taken away in many cases by different acts of Parliament, we think the analogy of common law ought to be followed; and, as at common law, the application for a writ of certiorari is always ex parte, we think that the authority of the Judge, or rather the right of the subject, should not be taken away without express words.

The enactment here is not framed to fetter the power of the Judge, but to give him additional power. He may inquire into all the circumstances, and clog the issuing of the writ, by such terms as he thinks fit. This he may do without having the other party before him. There are neither express words nor necessary implication to limit the power of the Judge.

The present rule must, therefore, be discharged.

Rule discharged.

PRATT v. PRATT and Others.

To a declaration in trespass for breaking and entering the plaintiff's house, and taking and carrying away his goods and chattels then being in the same, and converting TRESPASS. The declaration stated that the defendants, on, &c., at, &c., with force and arms, &c., broke and entered a certain dwelling-house of the plaintiff, and then in the plaintiff's occupation; and then made a great noise and disturbance therein, and stayed and continued therein making such noise and disturbance for a long time, to wit, &c.; and then forced and broke open two windows of the

and disposing thereof to the defendants' use; the defendants pleaded a justification of the entry, that the dwelling-house was the freehold of T. P., and that they entered as his servants, and because the plaintif's goods were encumbering on the close, they removed them off to a convenient distance: *Held*, on special demurrer, that the allegation in the declaration of the conversion of the goods was mere matter of aggravation, and that the plea, therefore, was not bad for omitting to justify it.

plaintiff, &c., of great value, to wit, &c. And also during the time aforesaid, &c., with force and arms, &c., seized and took divers goods and chattels of the plaintiff, to wit, &c., then found and being in the said dwelling-house, and carried away the same, and converted and disposed thereof to their own use. By means of which said several premises the plaintiff and his family were, during all the time aforesaid, not only greatly disturbed and annoyed in the peaceable possession of the said dwelling-house of the plaintiff, but the plaintiff was also, during all that time, hindered and prevented from carrying on and transacting therein his lawful and necessary affairs and business, &c.

Third plea. That the said dwelling-house in which, &c., at the said time when, &c., was the dwelling-house, soil and freehold of one T. P.; whereupon the defendants, as the servants of the said T. P., and by his command, broke and entered the said dwelling-house in which, &c., at the said time when, &c.; and because the goods and chattels in the declaration mentioned, and every part thereof, at the said time when, &c., were and was in and upon the said dwelling-house in which, &c., encumbering the same, they the defendants, as the servants of the said T. P., and by his command, in order to remove the said encumbrances, seized and took the said goods and chattels in the declaration mentioned, and then carried and conveyed the same away from and off the said dwelling-house, in which, &c., to a small and convenient distance in that behalf, and there left the same for the plaintiff, as they lawfully might for the cause aforesaid, which are the said alleged trespasses in the declaration mentioned. Verification.

Special demurrer. The cause stated was, that the plea professed in the commencement thereof to be an answer to the whole declaration; yet that, although the declaration alleged that the defendants converted and disposed of the said goods and chattels to their own use, the said plea did not state or shew any answer to that part of the declaration.

PRATT

PRATT

PRATT

and Others.

PRATT
v.
PRATT
and Others.

Pigott, in support of the demurrer. The plea is bad, because it professes to answer the whole declaration, and yet offers no justification for the conversion of the plaintiff's goods. The conversion is not alleged as mere matter of aggravation, but as a substantive cause of action. The case of Fouldes v. Willoughby (a) shews that every wrongful taking of the goods of another is not necessarily a conversion. He referred also to Oxley v. Watts (b); Smith v. Edge(c); Gregory v. Hill (d); and Woods v. Durrant (e).

Phipson, contrà, was stopped by the Court.

PER CURIAM (f).—The plea is sufficient. The defendants were only bound to justify the trespasses alleged in the declaration, which were the breaking and entering the plaintiff's house, and seizing and carrying away his goods. The conversion of the plaintiff's goods is mere matter of aggravation.

Judgment for the Defendants.

(a) 8 M. & W. 540; S. C. 1	(d) 8 T. R. 299.
Dowl. 86, N. S.	(e) 16 M. & W. 149.
(b) 1 T. R. 12.	(f) Pollock, C. B., Alderson, B.
(c) 6 T. R. 562.	Rolfe, B., and Platt, B.

RICHARDS v. LORD SUFFIELD.

The 6 & 7 Vict. c. 73, s. 26, disables an attorney, who is uncertificated, from suing only for fees, reward, or disbursement for any business, matter, or DECLARATION in assumpsit. The first count stated that the defendant was indebted to the plaintiff for the work, labour, care, diligence, journeys, and attendances of the plaintiff by him done, performed, and bestowed as the attorney and solicitor of and for the defendant, and at his request, and for fees due and of right payable to the plain-

thing done by him as an attorney or solicitor in some suit or proceeding in one of the Courts mentioned in the act; and not for business done which has no reference to such suits or proceedings.

tiff in respect thereof, &c. The second count was for other work and labour; and the third count for money paid.

Plea. That the plaintiff under and by virtue of the first, second, and third counts, claims and seeks to recover against the defendant certain fees, rewards, and disbursements for and in respect of certain business, matters, and things theretofore done by the plaintiff as an attorney and solicitor for him the defendant; that at the time the said business. matters, and things were done by the plaintiff as aforesaid, to wit, &c., the plaintiff, as such attorney and solicitor as aforesaid, did then carry on certain proceedings, to wit, conduct and manage a certain cause in which J. G. was plaintiff, and the now defendant was defendant, in the Court of Exchequer at Westminster, without having previously obtained, or then having, a stamped certificate then in force, contrary to the form of the statute, &c.; and that the said business, matters, and things for the recovery of the fees, rewards, and disbursements in respect of which this action is brought, and each and every of them, were and was done by the plaintiff as such attorney and solicitor as aforesaid, whilst he was without such certificate, &c. Verification.

Special demurrer, stating for causes, amongst others, that it did not appear that the business, matters, and things done by the plaintiff as an attorney and solicitor, in respect of which the fees, rewards, and disbursements in the said first, second, and third counts are alleged to be claimed, were done by the plaintiff in and about suing, prosecuting, defending, or carrying on any action or suit, or any proceeding in any of the Courts, in the statute in such case made, mentioned.

Joinder in demurrer.

The Court called on

Hurlstone, to support the plea. The validity of this plea turns upon the construction to be put on the 6 & 7 Vict.

RICHARDS

V.

LORD
SUFFIELD.

RICHARDS
v.
LORD
SUFFIELD.

c. 73, s. 26 (a), which enacts that no person who as attorney shall sue, &c., without having previously obtained a stamped certificate, "shall be capable of maintaining any action or suit at law," &c., "for the recovery of any fee," &c., "for or in respect of any business, matter, or thing done by him as an attorney or solicitor as aforesaid, whilst he shall have been without such certificate as last aforesaid." It is submitted that the word "business" here must have the same construction as in the 37th section, and apply to all business done by him as attorney, whether it be done in a Court of law or equity, or not. The Legislature no doubt meant it as a punishment to the attorney for not duly taking out his certificate, that he should be unable to recover in an action for any business done as an attorney. The plea follows the words of the section. He referred to ss. 35 and 36, as shewing that where the Legislature meant to restrict the incapacity to sue, they had so expressed themselves; and also to statute 25 Geo. 3, c. 80, ss. 1, 3, 7; statute 37 Geo. 3, c. 90, s. 31; and to Wilton v. Chambers (b).

Temple, in support of the demurrer. If the construction sought to be put upon the 26th section be correct, it would apply to business done by an attorney in conducting a bill in Parliament, or a matter before arbitrators, or in transacting business under a power of attorney. And an attorney might have a very good claim against his client to-day, but if to-morrow he were to do business for any other person in a

(a) 6 & 7 Vict. c. 73, s. 26. "That no person who, as an attorney or solicitor shall sue, prosecute, defend, or carry on any action or suit, or any proceedings, in any of the Courts aforesaid, without having previously obtained a stamped certificate which shall be then in force, shall be capable of maintaining any action

or suit at law or in equity, for the recovery of any fee, reward, or disbursement for or in respect of any business, matter, or thing done by him as an attorney or solicitor as aforesaid, whilst he shall have been without such certificate as last aforesaid."

(b) 7 A. & E. 524; S. C. 2 N. & P. 392.

Court of law or equity, his claim could not be enforced. It is submitted, that looking at the 26th and 2nd sections together, it is plain that the Legislature never intended to impose the disability of recovering for all business done as an attorney or solicitor, but only in respect of such as was done in any Court of law or equity.

RICHARDS
5.
LORD
SUPPIELD.

Cur. adv. vult.

PARKE, B., delivered the judgment of the Court (a).—
The principal objection to this plea on the argument of the demurrer was, that it does not appear by it that the action was brought for fees, rewards, and disbursements, within the meaning of the 6 & 7 Vict. c. 73, s. 26; the plaintiff's counsel contending that this disables an attorney who is uncertificated only from suing for fees, rewards, or disbursements for any business, matter, or thing done by him as an attorney or solicitor in some suit or proceeding in one of the Courts mentioned in the act, and not for business done which had no reference to such suits or proceedings; and we are of that opinion.

The 26th section provides "that no person who, as an attorney or solicitor, shall sue, prosecute, defend, or carry on any action or suit, or any proceedings, in any of the Courts aforesaid, without having previously obtained a stamped certificate which shall be then in force, shall be capable of maintaining any action or suit at law or in equity, for the recovery of any fee, reward, or disbursement for or in respect of any business, matter, or thing done by him as an attorney or solicitor as aforesaid, whilst he shall have been without such certificate as last aforesaid." The question is, what meaning we are to attribute to the words of reference in the expression "as an attorney or solicitor as aforesaid." We think they must necessarily refer either to an attorney or solicitor acting as described in the com-

(a) In Trinity Vacation.

RICHARDS

V.

LOBD
SUFFIELD.

mencement of that section, or to the previous description of an attorney or solicitor in the 2nd section; and, in the former case, the disability will be confined to suits for fees, &c., due for business as an attorney in suing, prosecuting, defending, or carrying on any action or suit, or any proceedings in any of the Courts aforesaid; in the latter, for fees due to any attorney, &c., acting as such in, or suing out any writ or process, or commencing, carrying on, soliciting or defending any action, suit, or other proceeding in the name of any other person, or in his own name, in any of the Courts mentioned in the 2nd section, including proceedings before one or more justices: so that it really makes no difference, whether the words "as aforesaid" relate to the beginning of the 26th or to the 2nd section. To one or the other they certainly do refer, and in either the disability to sue is confined to fees, &c., connected with a suit.

It was, however, argued in support of the plea, that the difference of the language of the Legislature in the 35th and 36th sections from that in the 26th, indicated a different intention in the Legislature.

The 35th section provides that if any person, not admitted and enrolled, sues out any writ or process, or defends an action, he shall be incapable of maintaining an action for any fees, &c., on account of prosecuting, carrying on, or defending any such action, suit, or proceeding, or otherwise, in relation thereto: and a similar provision is made by the 36th section, if any person shall commence, or carry on, or defend any action in the County Court. The language being more general in the 26th section, it was contended that the restriction in that section was meant to be more extensive.

It appears to us that the words of reference "as an attorney or solicitor as aforesaid," confine the disability to the same class of fees, rewards, and disbursements as those pointed out expressly in the 35th and 36th sections.

This being so, the plea is, in our opinion, defective, in

not averring that the fees, &c., were due to the plaintiff as an attorney in prosecuting or defending a suit or a proceeding in a Court. They are not even stated to be due to him as an attorney at law, and they might be payable to him as an attorney acting before arbitrators, or a compensation jury, or transacting business under a power of attorney for the defendant.

1848. RICHARDS LORD Supplet.D.

Judgment for the Plaintiff.

DODGSON, P. O. v. Scott, P. O.

(Coram Parke, B., sitting alone.)

THIS was a rule obtained on behalf of the plaintiff, one The 7 Geo. 4, of the public officers of the Whitehaven Bank, calling upon enacting that one John Brooke to shew cause why an execution upon a scire facias should not issue against him, upon a judgment ment obtained

" execution public officer

for the time being" of a banking company, "may be issued against any member or members for the time being of such corporation or copartnership," means an execution against the persons who, at the time of issuing the scire facias, are members of the banking company.

In issuing execution against the members of a banking company, against the public officer of which a judgment has been obtained, under the 7 Geo. 4, c. 46, s. 13, the proper course is to proceed first against those who are members at the time the scire facias issues; then, in the event of an execution against them being unsuccessful, against those who were members at the time of the contract being entered into; then, in the like event, against those who were so at the time of the contract becoming executed; and lastly, against those who were so at the time of the

judgment being obtained.

And in order to obtain leave to issue a scire facias against members of the second or subsequent class, all that is necessary to be shewn on the face of the affidavits is a reasonable certainty that any further proceedings against the first or previous class of members would prove ineffectual.

It is no cause to shew against a rule for leave to issue a scire facias against a member of a banking company, who was a member at the time of the contract entered into, on a judgment obtained against the public officer of the banking company, that the judgment was fraudulently concocted to the prejudice of the members. That is the proper subject of a plea to the scire facias, or of an application to set aside the proceedings as fraudulent.

Execution cannot be had under the 7 Geo. 4, c. 46, s. 13, against persons who have become members of a banking company after the contract was completed, but who have ceased to be so

before judgment obtained.

After judgment against the P. O. of a banking company, a rule nisi for leave to issue a scire facias against B., one of the members at the time of the contract being entered into, was obtained. After being twice enlarged, the plaintiff gave notice to B. of his intention to abandon it, and pay the taxed costs, and the costs were taxed and paid to B. accordingly: Held, that the plaintiff was not precluded from again applying to the Court for leave to issue a scirc facias against B.; although the affidavits disclosed no new facts.

Semble, that the rule prohibiting a party from moving the same rule twice, does not apply to motions for leave to issue a scire facias under the 7 Geo. 4, c. 46, s. 13; and that a second application may be made on new facts.

Dodgson v. Scott.

recovered by the plaintiff against the public officer of the Newcastle Joint Stock Banking Company, the said John Brooke having been a member of that company at the time the contract was entered into, but having ceased to be so at the time the judgment was recovered.

It appeared upon the affidavits, that upon the 29th of May, 1847, a similar rule to the above had been obtained, for leave to issue a scire facias against Mr. Brooke, upon such affidavits as were then produced. The rule was enlarged; no cause was shewn in the course of Trinity Term, and it was then further enlarged to shew cause in Michaelmas Term. On the 7th of January, 1848, the plaintiff gave Mr. Brooke the following notice:-" Take notice, that the plaintiff hereby abandons the rule nisi, made in this cause on the 29th of May last, whereby it is ordered that John Brooke therein named, shew cause, on Friday the 4th of June next, why a writ of scire facias on the judgment obtained by the plaintiff in this cause should not issue against him, as a member of the Newcastle Joint Stock Banking Company: and the plaintiff in like manner abandons the rules subsequently made for enlarging the said rule of the 29th of May last; and the plaintiff hereby offers to pay any costs which may have been properly incurred in consequence of the said rule to be taxed by the Master." No objection was offered to this course by Mr. Brooke, and the costs were taxed and paid accordingly. Subsequently, the present rule was obtained upon the same materials as the former one; against which,

W. H. Watson, Cleasby, and Willes, shewed cause.

The Attorney General and Martin, in support of the rule.

The arguments and authorities cited at the Bar are sufficiently adverted to in the judgment.

Cur. adv. vult.

PARKE, B.—I cannot help regretting that I should be called upon to decide this case, which involves a very important rule of practice, and also some important questions of law arising upon the construction of the statute. However, it became impossible to dispose of the matter before the full Court, and I have now to pronounce my decision upon the question which comes before me, which I am happy I shall be able to do, with the assistance of the Court upon the principal point, all of them concurring with me in opinion, that no rule of practice prevents me from entertaining this application. With regard to the other parts of the case, I shall pronounce my opinion according to the best judgment I can form upon it. principal point is, whether it is now competent to entertain this application. Upon that I have had the assistance of the other Judges of this Court, and I have also conferred with some of the Court of Queen's Bench.

This is an application under the statute 7 Geo. 4, c. 46, s. 13, for permission to issue a scire facias, or, in other words, to issue execution by means of a scire facias against Mr. Brooke, who is alleged to have been a member of the banking company, here sued in the name of their public officer, at the time when the contract sued on was entered into by that company with the plaintiff.

Several objections were taken to the plaintiff's right to this rule, one of which was disposed of in the course of the argument, namely, that the judgment was a judgment that was fraudulently concocted to the prejudice of the proprietors in the joint stock bank. If there is any thing in the objection, there is no doubt the defendant must avail himself of it, either in the form of a plea to this scire facias, or in the form of an application specifically for the purpose of setting aside the proceedings as fraudulent; and I have now, therefore, to address my attention only to the other points that were moved before me.

The first of these then is, is it competent for me to

Dodgson 5. Scott.

Dodgson v.

entertain this application at all; the objection being, that it has been already disposed of in such a way as, according to the established practice of the Court, to preclude any further inquiry? Several cases were cited to shew to what extent the Court had gone in laying down the rule, that after an application to them has been made, and has failed on account of defective materials, they will not allow any further inquiry. There is no doubt that such is the established practice of the Court of Queen's Bench, as appears from the cases which have been cited, and I presume it would be the practice of the other Courts also. practice appears not to have been first adopted, but sanctioned by a rule of the Court of Queen's Bench, of Hilary Term, 3 Jac. 1; by which it was made highly penal if a matter had been disposed of in the presence of the counsel of both parties to agitate the same matter again; and that upon the principle that where once there had been a judgment upon the case, it was conducive to the due administration of justice that the matter should no longer be agitated. Now, there can be no doubt that the Courts have gone beyond that part of the rule which requires the matter to have been disposed of in the presence of counsel of both parties, because they have held a party to be equally bound when the rule which he has obtained was discharged, although he himself, the counsel for the party obtaining the rule, was never heard. Many cases were cited as having been recently disposed of in the Court of Queen's Bench, on the general principle which I have stated; Rex v. Orde (a); Reg. v. The Manchester and Leeds Railway Company (b); Reg. v. The Inhabitants of Barton (c); Reg. v. Pickles (d); Reg. v. The Great Western Railway Company (e); in all of which the rule was recognised, that if there has been an application to the Court

⁽a) 8 A. & E. 420, n.

⁽d) 12 Law Jour. Q. B. N. S.

⁽b) Ibid. 413.

^{40.}

⁽c) 9 Dowl. 1021.

⁽e) 5 Q. B. 597.

and the matter has been disposed of by the Court, the parties will not be allowed to re-agitate the same matter. An exception, indeed, exists in cases where the affidavits have been wrongly entitled, or there has been a defect in the jurat of the affidavit. None of those cases go the length of saying, that under such circumstances he shall not make an application to the Court upon fresh materials; nor do I understand that the Court of Queen's Bench has so decided. The case of The King v. Bowditch (a), was an application made for a criminal information, which was refused, on the ground of there not being sufficient evidence of the defendant's handwriting; and the Court, upon a subsequent application, would not allow the plaintiff to amend the case, by producing affidavits as to the handwriting of the defendant. That decision went simply upon the ground that the granting a criminal information was an extraordinary remedy, and that a party having taken his chance once, there was no reason why he should have a remedy given him on a second application, the law being open to him to proceed by way of indictment. That question, however, it will not be necessary further to advert to in the present case, because it does not appear upon these affidavits that any fresh materials have been obtained; and, therefore, the question will turn upon quite a different point, upon which I am to pronounce my judgment, in which the rest of the Court concur.

Now, the question is, whether the same rule applies to a case in which the plaintiff having obtained a rule, afterwards chooses to abandon it. In this case a rule was obtained on the 29th of May, 1847, for leave to issue a scire facias against Mr. Brooke, upon such affidavits as were then prepared. The rule was enlarged; no cause was shewn in the course of Trinity Term, and it was then further enlarged to shew cause in Michaelmas Term, and subsequently enlarged to Hilary Term, 1848. In the

(a) 2 Chit. Rep. 278.

Dodgson 9.

Dodgson v. Scott.

meantime, on the 7th of January, 1848, the plaintiff gave notice of his intention to abandon the rule, and pay the taxed costs of it, which offer was accepted, and those costs paid; and the first question arising on that state of facts is, whether the matter must be considered as having been finally disposed of by the Court; for if it has, and the plaintiff's application is to be understood as having been once refused, it will become necessary to consider the next question, namely, whether this case forms an exception to the general rule, which prohibits the moving the same matter a second time. As to this latter point, I am by no means prepared to say that it would not, and in this the rest of the Court concur with me, without, however, meaning to give a binding decision upon the point. We feel a difficulty in applying the same strict rule to a writ which is given as a statutory writ, and which is given in lieu of an immediate action. There is no doubt that if the plaintiff had issued a scire facias against one or more members, or several writs of scire facias, (supposing it to be competent for him to do so), in the first instance, against those who were the parties "for the time being," and if he had been nonsuited in one of those actions of scire facias. it would have been perfectly competent for him, without leave of the Court, to proceed again by a second scire facias, and so on, toties quoties, until the scire facias had been determined by a verdict for the plaintiff or for the defendant. And this being an application to the equitable jurisdiction of the Court to have a remedy against a second class of persons, whoever the first may be, it would be difficult to say that the Court should be so totally bound up by any rule as that they would not permit a second scire facias to issue on a second application (which is a necessary step to it) in case the first had failed; but I agree that in such a case it would be proper that the party applying a second time to the Court for permission, should lay before it some ground why he had failed upon the first,

and shew some good reason why he should apply to the Court a second time to make the defendant liable to a scire I have before observed, that upon looking through the affidavits, there is no explanation why it was that the first scire facias was abandoned, and no new facts are said to have been discovered by the plaintiff to justify him in making a second application to the Court. There is no affidavit that at the first time the application was made they had made what they thought a sufficient inquiry, but that since, on making further inquiry, they had discovered clear evidence of the insolvency of some of the parties, whereon to justify the application to the Court on new facts. affidavits do not contain a word of that; all I know upon these affidavits is, that in the first instance the plaintiff obtained a rule, and afterwards, for some defect or another in the affidavits (what it was does not appear) abandoned it, and now again applies to the Court.

The question here then is, whether, simply because the plaintiff has obtained a rule under the circumstances here stated, he is to be considered as bound by it in the same way in which he would be bound by a decision of the Court on the case coming before it, and being disposed of This depends entirely upon what is the effect of the plaintiff withdrawing his application. On the 7th of January, 1848, the rule having been twice enlarged, the plaintiff gave the following notice to Mr. Brooke. [His Lordship here read the terms of the notice.] To that proposal Brooke accedes, and the costs of those proceedings are taxed and paid accordingly; and the question really is, what is that bargain between the parties? Is it a bargain that they should be placed in precisely the same situation as if the rule had been brought on and disposed of by the Court; or is it an offer merely to withdraw the writ, and that the plaintiff should stand in the same situation as if that writ had not issued at all? That is really a question of what construction is to be put upon this agreement.

D. & L.

VOL. VI.

Dodgson

Scott.

Dodgson s. Scott.

If the former construction is to prevail, and the party is to be in the same situation as if the rule had been disposed of by the Court, then, I think, the plaintiff must fail in this application for the reasons I have mentioned, namely, that he has not shewn any satisfactory reason upon his affidavit why this case is different now from what it was on the 29th of May, 1847, at the time he first made this application. But if the meaning is this, "I will agree to withdraw what I have already obtained, and to stand in the same situation as if the rule was not issued, and will now at once offer to pay you the costs of that rule; but if you choose to go on, then the matter must be tried in Court, and you must take your chance of succeeding or not;" then the plaintiff will succeed. really a mere question of construction upon the agreement of the parties, and having conferred with my Brother Judges upon that subject, we are all of opinion that the real meaning of the contract is, that the former application was to be withdrawn, Brooke consenting to receive the costs absolutely; whereas, if the matter had gone on, in case of a refusal, the plaintiff would, peradventure, have succeeded; at least he would have had his chance of succeeding.

The question then will be, whether, supposing that this was a new application to the Court, founded upon this affidavit, the plaintiff would be entitled to succeed; and whether permission ought to be given to him to issue a scire facias against Brooke; and the question which arises in the first instance is, whether he was a partner at the time of the contract being entered into. I do not trouble myself with that part of the affidavits which disputes that fact, because that is a matter which must be tried upon the plea to the scire facias: but I direct my attention to the other facts of the case, which, it is very properly argued, could not be questioned upon any issue to the writ of scire facias; and, therefore, I must take care, to the best of my

ability, to be right in forming my judgment upon them. Now, the objections that are made to the issue of this scire facias are, first, that the plaintiff has not taken the proper steps in the first instance, by issuing a scire facias against the proper persons primarily liable; and, secondly, that supposing the plaintiff has done that, then upon these affidavits there is no sufficient case made out for the interference of the Court in granting this scire facias against the party to the contract; because other writs have been sued out against other parties, and it is yet undetermined that the result of them will be fruitless.

The first and important question in the case, which I very much regret that I should have, for the first time, absolutely to determine, although there are dicta upon the subject, and a prevalent opinion respecting it, is as to what class of persons are meant to be designated by the statute under the description of persons "for the time being." Now, it cannot be denied that this statute is very inartificially framed; and I have no doubt that the person who prepared the 13th clause had in his mind an idea which the recent decisions shew was erroneous. no doubt but that the framer of that clause supposed that as soon as a judgment was obtained against the nominal defendant, the public officer, it would be competent for the plaintiff to issue, immediately, execution against those persons whose names were enrolled as partners in the concern, and that there need not previously be a suggestion upon the record, or a writ of scire facias, or any other proceeding. In that respect he was wrong, because it was first decided in Ireland that you could not make a person liable who was not made a party to the record by some proceeding or other; and in the case of Barton v. Hunter (a), before Lord Chief Justice Bushe, the course suggested was that there should be a suggestion on the record, that being Dodgson v. Scott.

(a) 1 Hud. & Br. 569, (Irish reports).

Dodgson v. Scott.

thought to be the proper technical mode of introducing facts on the record which did not appear on the record before. In the case of Bartlett v. Pentland (a), the Court of Queen's Bench concurred in opinion with the Irish Court that it was not competent for the plaintiff to issue a process of execution against a man who did not upon the record appear to be a party to the judgment, the Court intimating that a suggestion was the proper mode of making him a party to the record. It was subsequently, however, considered, and very properly, that this was not the technical mode of proceeding, but that the proper mode was by issuing a scire facias against the persons who were alleged to be partners at the time, and to give them an opportunity of pleading to the scire facias, that they were not partners; and if they were, then they would properly become liable to the judgment on the record; Ransford v. Bosanquet (b); Cross \forall . Law (c); Whittenbury \forall . Law (d); Harwood v. Law (e); Clowes v. Brettell (f). Now, I think it impossible to deny that the class of persons who must have been liable to an execution in the first instance, if the notion of the framer of the act had been carried into effect, is the same class who must now be proceeded against by scire facias in the first instance. It is impossible to foresee who would be parties at the time of levying the actual execution; and no other date, therefore, can be assigned for the issuing of the scire facias. I think that is a matter which does not admit of the least doubt; and then the question is, what is the class of persons who are to be liable according to the terms of this clause. Now, it is a good rule to go by, in the construction of a statute, to take its grammatical construction, and to act upon it, unless it leads to some incongruity or manifest absurdity. words of the clause are, "execution upon any judgment"

⁽a) 1 B. & Ad. 704.

⁽d) 6 Bing. N. C. 345.

⁽b) 12 A. & E. 813.

⁽e) 7 M. & W. 203.

⁽c) 6 M. & W. 217.

⁽f) 10 M. & W. 506.

"obtained against any public officer for the time being of any such corporation or copartnership, carrying on the business of banking, under the provisions of this act, whether as plaintiff or defendant, may be issued against any member or members for the time being of such corporation or copartnership." What is the grammatical construction of the words "for the time being?" Surely they mean for the time being of the act with respect to which it is spoken; this must, therefore, be an execution against the persons who, at the time of the execution, were members of the banking body. That is, undoubtedly, the grammatical meaning of the terms "for the time being," to whatever subject or to whatever act they apply. The Legislature is to be considered as speaking of the persons who fill a particular character at the time of the act about to be done, unless it can be shewn by the context that there is clearly a different meaning to be put on the words. Mr. Cleasby, in a very able argument, suggested that there would be a great hardship in making persons liable upon contracts who were not liable at the time of the contract made; and that the context shewed that the proper meaning of the terms "for the time being" must be, persons who were members of the company at the time of the commencement of the original action. That, as I have said before, is surely not the grammatical construction of the words; and besides, it would let in an absurdity as great, or nearly as great, as any which would follow from taking the words in their ordinary grammatical sense; because it makes persons liable, who were partners at the commencement of the action, who were not liable at the time of the contract made. But it is quite impossible, looking at this act of Parliament, to say that the Legislature meant to restrict the creditor to the common law liability of the debtors: for this act of Parliament really makes three other classes of persons liable, besides those who are to be proceeded against in the first instance. It makes, in the first place, those liable who were partners at the time of the

Dodgson v. Scott.

Dodgson b. Scott.

execution; and then, in failure of these, those who were members at the time the contract was entered into; the provision being that the parties may "issue execution against any person or persons who was or were a member or members of such corporation or copartnership at the time the contract or contracts, or agreement or agreements on which such judgment," &c., "were entered into." This is the common law liability; but the statute does not confine it to persons who were partners at that time; for it goes on to say, "or who became a member or members at any time before such contract was executed:" So that in the case of executory contracts, those are liable who are partners at the time of the execution of the contract, and they were not liable at common law. And, in the next place, it makes those liable who were members "at the time of the judgment obtained," and these also were not liable at common law. It is, therefore, perfectly clear that this statute means to impose some additional liability beyond that which the common law imposed on the members of those copartnerships. I think there is no doubt that the object of the Legislature was to accomplish a thing which it is very difficult to accomplish, namely, to treat those bodies as corporations, notwithstanding the fluctuating nature of their members; to make them liable to contracts, notwithstanding the change in their members; not only to make the partnership property liable, but further to make each individual personally responsible for the debts of the partnership. The object of the Legislature in allowing execution to be taken out against persons who were not liable as contracting parties, and also against those in the second degree, who were partners at the time of the contract executed or judgment obtained, and not at the time of the contract, was upon the supposition that these persons had all the means of applying the funds of the society, and ought to have applied them, to the payment of the partnership debts. And probably, they considered that persons who were actual members at the time the execution issued, and

when the debt, therefore, ought to be paid, are the persons who, in the first instance, ought to be looked to, to take care that the partnership funds were applied to the payment of the debt; and that if they do not choose to apply them, or had not the means of applying them, they should be responsible in their own persons for its due payment. That seems to be the principle upon which the Legislature acted,—a principle of some harshness towards those who were members at the time that the execution issued; but then there is no doubt, as the Attorney General in the course of the argument has observed, that this act was framed upon the supposition that these companies would be always solvent, and would have funds to pay their debts with. If that is the right view, the effect is to make those who are partners, at the time the execution issues, liable; and then, in the event of an execution against them being unsuccessful, the remedy is to be taken against those who were partners at the time of the contract being entered into; then, against those who were so at the time of the contract being completed; then, against those who were so at the time of the judgment being obtained. It is to be observed that the Legislature have let slip one class of persons, whether intentionally or not I do not know, namely, those who have become partners after the contract was completed, and have ceased to be so before judgment obtained, although they were partners at the time the action was commenced: that case the Legislature did not provide for, and they are certainly exempt, for there are no words to embrace them. My opinion, therefore, is, that in this instance the plaintiff, by taking his remedy, by issuing writs of scire facias against the existing members of the company,—I mean those existing at the time the scire facias was obtained,—has pursued the proper course, and that he was not bound to take out any scire facias, and would have been wrong if he had taken out any scire facias against those who were partners at the time that the action was commenced.

I come, therefore, to the last question, whether or not the plaintiff has entitled himself to this interference of the Dongson b. Scort. Dodgson v.

Court by the steps which he has taken against those who were members at the time. Now, the affidavits state, and there is a list annexed, that there are a great number of persons who were partners in this concern, against whom it would be, undoubtedly, useless to take any proceedings. Seven writs of scire facias have been issued, which promise a result of about 130L altogether. But then it is said that there are two persons against whom no effectual steps have been taken in order to make them responsible, and against whom proceedings might be taken with effect. one a scire facias issued, and it is objected that the present proceedings ought not to be allowed until that scire facias has come to its determination, and been finally disposed of. Now, if I am satisfied that that scire facias would produce no result at all worth the expense of proceeding in it, then the pendency of such scire facias is no answer to this application; and I take it that is the principle of the case of Field v. M'Kenzie (a), in which my Lord Chief Justice Wilde seems to have thought at first that you must issue a scire facias against every individual member "for the time being," before you can apply to the Court for its interference against a person who was a member at the time of the contract made. This opinion was overruled by the rest of the Court, who thought it was enough if they were satisfied that every reasonable and proper effort had been made for the purpose of obtaining payment of the debt due to the creditors, by recourse to those who were primarily liable. That is the rule upon which I think I must act in the present case, and referring to the affidavits in the first place, with regard to the persons against whom the scire facias is pending, it appears to me that, looking to the affidavits on both sides, there appears to be no reasonable expectation of gaining anything from the scire facias. The defendant there, it appears, was the promoter, and was a trustee for a Scotch insurance office; and he accepted the shares as such trustee. I think it is

impossible to make the partners in the Scotch insurance office liable, through his instrumentality, directly; but then it is said, that if he were to pay the amount, he would have his remedy in equity against the cestuis que trust; and suppose that that was not so, still if he was sued, and the scire facias was pursued to execution, the probability is that the members of the Scotch company would not leave him to pay the debt, but would come forward on a principle of honour, and discharge him. I think that is rather too remote a contingency for me to say that any good result can reasonably be expected to be produced from that scire facias, unless the defendant is himself a person in solvent circumstances. Now, the affidavits on the part of the plaintiff shew that he is not a man likely to pay any reasonable portion, or indeed anything, of the considerable debt which is in dispute in this action; while the affidavits on the other side, although they say he is apparently carrying on business, do not remove that impression from my The same also may be said with regard to the other individual. He is a person said to be possessed of considerable property. The affidavits on the other side say that the property is greatly encumbered by mortgage beyond its real value; and that, therefore, any proceeding against him must be hopeless.

I therefore think, that in this case the plaintiff has done what the majority of the Court of Common Pleas, and, ultimately, I believe my Lord Chief Justice Wilde said, was necessary in such a case. A similar rule, I think, was previously laid down in the Court of Queen's Bench, (see Eardley v. Law (a), and Harvey v. Scott (b).) The rule is, that all that is requisite in such a case is to shew a reasonable certainty that the remedies against the existing members would be ineffectual. This the plaintiff has done; and I think, therefore, that this writ ought to go.

Rule absolute.

Dodgson v.

⁽a) 12 A. & E. 802.

⁽b) 17 Law Jour. N. S. Q. B. 9.

1848.

MAILÉ v. MANN.

The attorney, and not the client, is the party liable in an action brought by a sheriff's officer to recover the amount of execution fees for an arrest under a ca. sa., made by the direction of the attorney.

A RULE had been obtained, calling upon the plaintiff to shew cause why the verdict entered for him in the above action should not be set aside, and a nonsuit entered instead thereof.

It appeared at the trial, which took place at the sittings in Michaelmas Term, 1847, before Platt, B., that the above action was brought by the plaintiff, who was a bailiff of the sheriff of Cambridgeshire, to recover from the defendant, who was a farmer residing in that county, certain fees, amounting to the sum of 3L 3s., for arresting and carrying to Cambridge gaol a person of the name of Payne, against whom the defendant had obtained a judgment, and issued a writ of ca. sa. The defendant, it appeared, had a claim against Payne on a promissory note, and had instructed his attorney, Mr. Wilkin; to bring an action upon it. Mr. Wilkin accordingly wrote to his town agents to commence an action, which they did, and subsequently obtained a judgment against Pavne. The defendant then instructed Mr. Wilkin to sue out execution against Payne, and Mr. Wilkin having written to his town agents to do so, those gentlemen issued a writ of ca. sa., and sent it to the undersheriff of Cambridgeshire, with directions that the warrant should be given to the plaintiff, a bailiff of the sheriff, who accordingly executed Under these circumstances it was insisted that the plaintiff's remedy was against the attorney who employed him, and not against the client, and that the action was therefore wrongly brought, and that the plaintiff must The learned Judge, however, refused to be nonsuited. nonsuit the plaintiff, and a verdict was returned in his favour, reserving leave to the defendant to move to enter a nonsuit. The above rule having been accordingly obtained,

Huddleston now shewed cause. The action is well brought against the client. The attorney acts as an agent of a disclosed principal throughout, and is only liable to the bailiff

for fees under special circumstances. In Hart v. White (a) it was held, that the solicitor under a commission in bankruptcy was not liable for the fees of the messenger, even although he nominated the messenger; Hartop v. Juckes (b); but that the remedy was against the petitioning creditor. In Robins v. Bridge (c) it was held, that the attorney in a cause was not personally liable to a witness, whom he subpænsed to give evidence, for the expenses of his attendance. In a late case of Maybery v. Mansfield (d), the Court of Queen's Bench held that the attorney of the plaintiff was not liable in an action brought by the sheriff to recover his fees due on the execution of a writ of ca. sa. against the defendant in the original action; and Mr. Justice Erle in that case is reported to have said, that "the law is, that the client is liable in such a case as this." [Alderson, B.—The dictum attributed to that learned Judge was not necessary for the determination of that case.] In a still later case of Seal v. Hudson (e), Mr. Justice Coleridge seems to have thought, that in a case like the present, the attorney was not liable. The case of Foster v. Blakelock (f) will no doubt be relied on by the defendant, as shewing that the attorney is liable to the sheriff's officer for the fees; but that case is distinguishable, as there the bailiff was specially employed by the attorney. The same remark applies to the case of Walbank v. Quarterman (g). In Newton v. Chambers (h) it was held, the bailiff might bring the action against the attorney, but there also, there was proof of an employment by the attorney, and of a special usage in the county, for the attorney to be charged with the fees.

Mailé J. Mank.

1848.

& R. 48. See also Ormerod v. Foskett, Peake's Add. Ca. 77; Townsend v. Carpenter, 2 C. & P. 118; S. C. R. & M. 314; and Branwell v. Penneck, 7 B. & C. 536; S. C. 1 M. & R. 409.

⁽a) Holt. N. P. C. 376.

⁽b) 2 M. & S. 438; S. C. 2 Rose, 263.

⁽c) 3 M. & W. 114; S. C. 6 Dowl. 140.

⁽d) 16 Law Jour. N. S., Q. B. 102.

⁽e) Ante, vol. 4, p. 760.

⁽f) 5 B. & C. 328; S C. 8 D.

⁽g) 3 C. B. 94.

⁽h) Ante, vol. 1, p. 869.

MAILÉ
MANN.

O'Malley, in support of the rule, was stopped by the Court, who intimated they would hear him, if they should afterwards consider it to be necessary.

Cur. adv. vult.

Rolfe, B., afterwards (a) delivered the judgment of the Court. In this case we think the rule must be made absolute to enter a nonsuit. The action is brought by the plaintiff, a bailiff of the sheriff of Cambridgeshire, against the defendant, to recover the sum of 3l. 3s. for the plaintiff's trouble in executing a writ of ca. sa. issued against a third party, at the suit of the defendant, and at his request. The defendant has pleaded non assumpsit. It was objected at the trial that the defendant was not liable, but that the defendant's attorney was the party who ought to have been sued, and upon this ground a rule was obtained to enter a nonsuit. The case was argued before us in last Trinity Term, and the Court took time to consider their judgment.

The case of Foster v. Blakelock (b) decides that a sheriff's officer, who has been employed by an attorney to execute writs for him, may maintain an action against the attorney for the fees usually paid on such occasions. The case of Walbank v. Quarterman (c) is expressly in point. There it was held, that an attorney who employs a sheriff's bailiff is liable to him for his fees, and that the client is not liable, there being no privity between him and the officer.

The plaintiff, on the other hand, relied upon the case of *Maybery* v. *Mansfield* (d). That decision, however, is not at variance with *Walbank* v. *Quarterman*, for in the former case, the action was by the sheriff, whose right of action depends upon statutes and not upon contract. The plaintiff, also relied upon the case of *Seal* v. *Hudson* (e) in the Bail Court, where my Brother *Coleridge* appears to have been

⁽a) In Trinity Vacation.

⁽b) 5 B. & C. 328.

⁽c) 3 C. B. 94.

⁽d) 16 Law Jour. N. S., Q. B.

^{102.}

⁽e) Ante, vol. 4, p. 760.

of opinion, that the sheriff's officer could not sue the attorney except under special circumstances. It does not, however, appear that the learned Judge's attention was directed to all the cases on the subject. If, however, the case of Seal v. Hudson (a) is to be considered at variance with those of Foster v. Blakelock (b) and Walbank v. Quarterman (c), and this Court is compelled to choose between conflicting authorities, we prefer adhering to Foster v. Blakelock.

MAILÉ B. MANN.

Rule absolute.

- (a) Ante, vol. 4, p. 760.
- (b) 5 B. & C. 328.

(c) 3 C. B. 94.

BUTLER v. CORNEY.

THIS was a rule calling on the plaintiff to shew cause why the defendant should not be at liberty to enter a suggestion on the roll to deprive the plaintiff of costs, under the County Courts' Act, 9 & 10 Vict. c. 95, s. 129.

The rule had been obtained on affidavits stating that the cause of action arose within the jurisdiction of the County Court, and was one for which a plaint might have been entered in the County Court. That the plaintiff had recovered a verdict for 191. 15s. only; that the plaintiff and the defendant resided within twenty miles of each other; and that neither of them was an officer of the County Court.

Needham shewed cause. The materials upon which this application is made are insufficient. It may be that this is

cation to enter a suggestion deprive a plaintiff of costs under the 9 & 10 Vict. c. 95. s. 129, it is only necessary that the affidavit should negative the exceptions in the 128th section, and if the plaintiff relies on the case coming within the provisions of some other section which would except it from the operation of

the 129th section, it is for him to shew that fact, and the defendant need not negative it in the first instance.

If a reasonable doubt exists, upon the affidavits, as to the fact whether the case comes within the 129th section or not, the Court will permit the suggestion to be entered; leaving the plaintiff to traverse or demur to it.

Quars, if actions on bills of exchange under 20% are within the jurisdiction of the County Courts?

BUTLER v. CORNEY.

an action by an attorney, in which case the plaintiff would have a right to bring it in the superior Court; *Jones* v. Brown(a); or it may be on a contract of marriage, or on a cause of action, excepted from the jurisdiction of the County Court, under the 58th section.

PARKE, B.—All that the defendant is bound to do is to bring the case within the 128th and 129th sections (b). If he does this, he does enough; and it is for the plaintiff to shew that the case comes within some other sections which interfere with the provisions of the 129th section. If the plaintiff be an attorney, or the action be an action for breach of contract of marriage, the plaintiff may shew that. The defendant is not bound to negative it.

(a) Ante, vol. 5, p. 716. See also Lewis v. Hance, ibid. p. 641. (b) 9 & 10 Vict. c. 95, s. 128. "That all actions and proceedings which before the passing of this act might have been brought in any of her Majesty's superior Courts of record where the plaintiff dwells more than twenty miles from the defendant, or where the cause of action did not arise wholly or in some material point within the jurisdiction of the Court within which the defendant dwells or carries on his business at the time of the action brought, or where any officer of the County Court shall be a party, except in respect of any claim to any goods and chattels taken in execution of the process of the Court, or the proceeds or value thereof, may be brought and determined in any such superior Court, at the election of the party suing or proceeding, as if this act had not been passed."

Sect. 129. "That if any action

shall be commenced after the passing of this act in any of her Majesty's superior Courts of record, for any cause other than those lastly herein-before specified, for which a plaint might have been entered in any Court holden under this act, and a verdict shall be found for the plaintiff for a sum less than twenty pounds, if the said action is founded on contract, or less than five pounds if it be founded on tort, the said plaintiff shall have judgment to recover such sum only, and no costs; and if a verdict shall not be found for the plaintiff the defendant shall be entitled to his costs as between attorney and client, unless in either case the Judge who shall try the cause shall certify on the back of the record that the action was fit to be brought in such superior Court."

See Meetan v. Nicholls, ante, vol. 5, p. 799.

Needham then relied on affidavits which he produced, shewing that the cause of action was on a bill of exchange. It is submitted that actions on bills of exchange are not within the jurisdiction of the County Courts. A cause of action on a bill of exchange cannot be said to arise in one place more than another; Mondel v. Steele (a). [Parke, B.—It has been said, that in a late case in the Common Pleas, the Chief Justice of that Court and my Brother Maule threw out some doubt as to whether actions on bills of exchange were within the County Courts' Act. I should like to know the ground upon which that doubt Alderson, B.—Is not the meaning of the 128th section that the superior Courts shall not have concurrent jurisdiction when any material part of the cause of action arises within the jurisdiction of the County Court?]

BUTLER

B.

CORNEY.

Manisty, in support of the rule. The affidavits shew that the cause of action is not solely on a bill of exchange, but for goods sold and delivered; and these latter are a material cause of action arising within the jurisdiction of the County Court. [Alderson, B.—The 128th section is awkwardly worded. I am not sure it does not mean "if no material part of the cause of action arises out of the jurisdiction," instead of meaning as I at first thought, "if any material part of the cause of action arises within it."] It is submitted that the section means to give a concurrent jurisdiction to the superior Courts in those cases only in which the cause of action does not arise wholly or in some material part within the jurisdiction of the County Court.

Pollock, C. B.—I am of opinion that this rule should be absolute on the simple ground that the matter should be put upon the record. By permitting the suggestion to be placed upon the record, we decide nothing finally; for the plaintiff may either traverse it or demur to it: whereas,

(a) 8 M. & W. 640; S. C. 1 Dowl. 155, N. S.

BUTLER

b.

CORNEY.

if we refuse this application, we decide conclusively against the defendant. It is sufficient that there is not such an answer given to this application, as to induce us to do that. I give no opinion upon whether an action on a bill of exchange under 20L is within the jurisdiction of the County Courts. It is enough that there exists a sufficient doubt to prevent us from depriving the defendant of the power to raise it on the record.

ALDERSON, B. (a).—I am of the same opinion.

ROLFE, B.—When it is once decided that the proper mode of proceeding is by entering a suggestion on the record, it is very inconvenient that we should try the question on affidavit. The necessity for coming to us for this leave is, I apprehend, only because the party has not the custody of the record. If a primâ facie case, therefore, is made out, it seems almost a matter of right that the suggestion should be entered.

Rule absolute.

(a) Parke, B., had left the Court during the argument.

CONNOP v. CHALLIS and Another.

The attorney of the plaintiff has no authority to order the discharge of the defendant out of custody upon final process, upon any other terms than

THIS was a rule calling upon the defendants to shew cause why the verdict in this case should not be set aside, and instead thereof a verdict entered for the plaintiff for 30L, pursuant to leave reserved to that effect at the trial.

It appeared that this was an action on the case against the defendants as sheriffs of Middlesex, for an escape;

those of payment of debt and costs.

Therefore, where the plaintiff's attorney, upon the defendant paying a portion of the debt, giving a warrant of attorney to secure the balance, directed the sheriff to discharge him out the sheriff accordingly did: Held, that the sheriff was liable as for an escape.

to which they had pleaded, first, the general issue; and, secondly, leave and license. At the trial, which took place before Pollock, C. B., at the sittings after Michaelmas Term, 1847, it appeared that the plaintiff had obtained a judgment in an action against one Walmsley, and issued a writ of ca. sa. against him, directed to the sheriffs of Middlesex. That the defendants directed their warrant to Garrett, one of their officers, to execute the writ, who accordingly arrested Whilst Walmsley was at the lock-up house, an arrangement was made between him and the plaintiff's attorney, that he should be discharged out of custody, upon payment of 25L, and giving a warrant of attorney to secure the residue of the debt. The money was paid, and the warrant of attorney given, and the plaintiff's attorney then gave the sheriff's officer the following written authority for Walmsley's discharge: - "Connop v. Walmsley. the defendant out of your custody on payment of the proper G. Milburn, plaintiff's attorney." Walmsley was accordingly discharged out of custody, and the present action was then brought. It did not appear that the attorney had any authority from the plaintiff to give this discharge; nor did it appear that the plaintiff had in any way repudiated the act of his attorney, other than by bringing the present action. Upon these facts it was contended, upon the part of the plaintiff, that he was entitled to a verdict for the full amount of the debt due from Walmsley; the attorney having no authority to order the discharge of Walmsley upon any other terms than upon payment of the whole debt; and the discharge by the sheriff, therefore, amounting to an escape. The Chief Baron directed the jury that if they were of opinion that the attorney had acted fairly and reasonably in the matter, and the plaintiff had not repudiated his acts, they should find a verdict for the defendants. The jury accordingly found a verdict for the defendants; leave being reserved to the plaintiff to move to have the verdict entered for him. A rule nisi having been obtained accordingly to enter a D. & L. VOL. VI.

CONNOP

CHALLIS
and Another.

CONNOP

CHALLIS
and Another.

verdict for the plaintiff; the amount, whether for the whole debt or for the residue for which the warrant of attorney was given, to be determined by the Court;

E. James and Burchell now shewed cause. The case of Savory v. Chapman (a), which seems at first sight an authority in favour of the plaintiff, is distinguishable. There an action had been brought against the marshal of the Queen's Bench for permitting the escape of a party imprisoned in execution, and it was held that it was no sufficient answer to plead that the attorney for the plaintiff, at whose suit the party was imprisoned, did, as such attorney, require and license the marshal to discharge the prisoner. There, it did not appear that the attorney had received any part of the debt, or any security even for its payment. In Payne v. Chute (b) it is said, that an attorney, after judgment, may acknowledge satisfaction on the record without a new warrant. If that be so, he may give a discharge, and it cannot be necessary that it should state on the face of it the receipt of the debt. [Platt, B.—The Reg. Gen., Easter Term, 7 Vict. (c), requires that the "satisfactionpiece shall be signed by the plaintiff or plaintiffs." That affords you an argument that previously the attorney alone might have signed it.] The case of Crozer v. Pilling (d) shews, that where a defendant, on being taken in execution under a writ of ca. sa., tendered the debt and costs to the plaintiff's attorney, the latter was bound to sign his discharge, and that he was liable to an action on the case, for refusing to do so, until the defendant had paid an independent collateral demand for costs. In the present case, the attorney did not order the discharge without taking security for the payment of the residue of the debt; and there must always be left a discretion in the attorney as to the sufficiency of the security. Besides here, the client has

⁽a) 11 A. & E. 829; S. C. 3 (c) 12 M. & W. 868. P. & D. 604; 8 Dowl. 656. (d) 4 B. & C. 26; S. C. 6 D. (b) 1 Roll, Rep. 365. & R. 129.

in no way repudiated the authority of his attorney, except by bringing the present action.

CONNOP

CHALLIS

Martin, in support of the rule. There is no relation and Another. subsisting between attorney and client, which would authorize the former to order the discharge of the debtor in execution upon any other terms than payment of the debt. [He was stopped by the Court.]

Pollock, C. B.—The rule must be absolute. It does not appear upon the evidence as given at the trial, that the plaintiff authorized the attorney in any way to enter into the agreement which he made with the defendant in the former action. Upon these facts, therefore, the sheriff is liable for an escape.

ALDERSON, B.—I am of the same opinion. The attorney has no authority from his client to accept any thing but money from the debtor. If he may take a warrant of attorney, he may equally take a bill of exchange or any other security.

ROLFE, B.—According to what fell from the Court in the case of *Payne* v. *Chute* it would seem that the attorney in the present case was justified in receiving the fruits of the execution as far as regarded the sum of 25l., which were put into his hands; but had no authority to order the discharge of the debtor, upon the latter giving him a warrant of attorney for the balance. The verdict must therefore be entered for the plaintiff for 30l.

PLATT, B., concurred.

Rule absolute accordingly.

1848.

RICHARDS v. JAMES.

A debt accruing due since action brought, cannot be the subject of a set-off in such action. DECLARATION in debt on an indenture, containing a covenant to pay to the plaintiff 500L, on the 22nd of January, A. D. 1830.

Plea. As to the debt and damages other than the costs of the action, that the plaintiff ought not further to maintain his action, because the defendant says, that after the commencement of this suit, and before the time of the pleading of this plea, he, the plaintiff, became and was, and still is, indebted to the defendant in the sum of 550L, for money since the commencement of this suit, and before the pleading of this plea, paid by the defendant for the use of the plaintiff, at his, the plaintiff's request; which said money exceeds the said debt and all damages other than the said costs; and which said money he, the defendant, hereby offers to set-off and allow to the said plaintiff, &c. Wherefore, &c.

Special demurrer. That the plea does not shew that the debt attempted to be set-off was due to the defendant at the commencement of this suit; and that it appears by the said plea, that the debt became due after the commencement of this suit; and that by law a debt becoming due after the commencement of an action, cannot be set-off in such action.

Joinder in demurrer.

Butt, in support of the demurrer. The plea is bad. The defendant has no right to plead a set-off which, before the new rules, he could not have given in evidence under the general issue upon a notice of set-off. The statute allowing set-off of mutual debts is the 2 Geo. 2, c. 22, s. 13 (a), and its language does not authorize any debts to

(a) 2 Geo. 2, c. 22, s. 13. "That where there are mutual debts between the plaintiff and defendant, or if either party sue

or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one be set-off except such as exist at the time of the commencement of the action. The cases of Evans v. Prosser (a), and Braithwaite v. Coleman (b), shew that a plea of set-off, which states the plaintiff to be indebted at the time of the plea pleaded, instead of at the commencement of the suit, is bad. [He referred also to Le Bret v. Papillon (c), and Rogerson v. Ladbroke (d).]

RICHARDS

D.

JAMES.

Phipson, contrà. It may be admitted that there is no case which decides that a plea like the present is good, but there is also none to shew that it is bad. The question, therefore, is, whether it may not come within the terms of the statute. That statute is remedial, and is, therefore, to be beneficially construed. It says, "where there are mutual debts between the plaintiff and defendant," "one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require." And it goes on to say, that where the general issue shall be pleaded, notice of the set-off shall be given at the same time. statute, therefore, seems to contemplate by the words "or pleaded in bar, as the nature of the case shall require," a plea of set-off like the present to the further maintenance of the action, and not a plea in bar to the whole action generally. [He referred also to Le Bret v. Papillon.]

Pollock, C. B.—There must be judgment for the

debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require, so as at the time of his pleading the general issue, where any such debt of the plaintiff, his testator or intestate, is intended to be insisted on in evidence, notice shall be given of the particular sum or

debt so intended to be insisted on, and upon what account it became due, or otherwise, such matter shall not be allowed in evidence upon such general issue."

- (a) 3 T. R. 186.
- (b) 4 N. & M. 654.
- (c) 4 East, 502.
- (d) 1 Bing. 93; S. C. 7 Moore, 412.

1848. RICHARDS JAMES.

There is no precedent for a plea like the plaintiff. present. The defendant cannot set-off in this manner a debt which has arisen since the commencement of the action.

ALDERSON, B.—The present case must have arisen again and again, and would, no doubt, have found its way into the books; but that every one must have thought that there was no doubt upon the subject.

ROLFE, B., and PLATT, B., concurred.

Judgment for the Plaintiff.

FAVIELL v. The EASTERN COUNTIES RAILWAY COMPANY.

An incorporated company were served with a writ in debt. An attorney on their behalf entered an appearance for them, and consented to a Judge's order to refer " the claims of the plaintiff

A RULE had been obtained in Easter Term last, calling upon the above named company to shew cause why they should not pay to the plaintiff the sum of 12,589l. 9s. 7d., being the amount awarded to him.

It appeared upon the affidavits that the plaintiff had issued a writ in debt against the company to which they had entered an appearance by an attorney. No further proceedings had been taken in the action, the attorney for

in the action" to arbitration. When the parties were before the arbitrator, the plaintiff adduced in the action" to arbitration. When the parties were before the arbitrator, the plaintiff adduced evidence of a claim of 10,307l. 0s. 1d., which was included in his particulars, but, to the proof of which, objection was made on behalf of the defendants, on the ground that it was a claim for unliquidated damages. The arbitrator received the evidence, and made his award for a sum of 14,000l. odd, including the above sum. The appointment of the attorney was not under seal, but it appeared that the company had notice of the proceedings taken by the attorney, and had not interfered.

On a rule under the 1 & 2 Vict. c. 110, s. 18, calling upon the company to pay the sum awarded: *Held*, that the question before the arbitrator having been whether the sum in dispute was one of "the claims of the plaintiff in the action," and he having decided that it was, his decision on this matter was final; and that the proper course for the company to have pursued was at once to have applied to a Judge to revoke the submission, on the ground that the arbitrator was exceeding his authority; and that not having done so, they were bound by his decision.

Held also, that the company having notice of the proceedings, and not having interfered, were estopped from contending that the attorney was not duly appointed under seal, or that he had no authority to profer.

no authority to refer.

the company having consented on their behalf to a Judge's order, directing "the claims of the plaintiff in the action, and the set-off of the defendants therein," to be referred to an arbitrator. The parties in pursuance of this order attended before the arbitrator, and claims were put in on behalf of the plaintiff for sums amounting to between 3000L and 4000L, which were admitted to be debts, and for a sum of 10,307L Os. 1d., which the plaintiff claimed as a debt, but which the defendants alleged was only recoverable, if at all, as unliquidated damages; and, therefore, not within the submission. The arbitrator received evidence of this latter sum, and awarded "that the plaintiff was entitled to recover in respect of his said claim, the sum of 14,410L 0s. 7d., and that the defendants were entitled, in respect of their set-off in the said action, to the sum of 1820L 11s., and that the plaintiff was entitled to recover the balance, the sum of 12,589L 9s. 7d." It appeared that the attorney for the company had not been appointed, as attorney to defend the action, under seal, or in any other manner than by a verbal authority from the chairman of the board of directors; nor had he any distinct authority to refer the action beyond what the fact of his employment as attorney would convey. It appeared, however, that the company had clear notice of his proceedings on their behalf, and that they had not interfered.

In Easter Term last, Martin had moved to set aside the award, on the ground that the arbitrator had exceeded his jurisdiction in awarding on a claim not within the terms of the order of reference; and also to set aside the order of reference, on the grounds that the attorney, as attorney, had no authority to refer the action; and that even if he had, it was shewn that he was not duly appointed as attorney, the defendants being a corporate body, and the appointment not being under seal. The Court, however, refused to grant either rule, saying, that if there were any weight in the objections urged, they would be available when the award came to be enforced.

FAVIELL

U.

EASTERN
COUNTIES
RAILWAY CO.

FAVIELL

T.

EASTERN
COUNTIES
RAILWAY CO.

The above rule having been afterwards obtained,

Martin, Willes, and Prentice, shewed cause. The award is bad for embracing matters not within the jurisdiction of the arbitrator. The reference was merely of "the claims of the plaintiff in the action." The arbitrator, therefore, had no authority to inquire into a matter which, being a claim for unliquidated damages, could not be the subject of an action of debt. It will be said, perhaps, that the arbitrator has in effect decided that this was a claim in the action, and that his decision on this point, however erroneous, is final. But it is submitted that an arbitrator cannot give himself a jurisdiction which did not previously exist, merely by deciding that the matter is within his jurisdiction. He is, in this respect, like a Court of inferior jurisdiction, who cannot by their erroneous finding, give themselves jurisdiction; Roberts v. Humby (a). Thus, the Court of Queen's Bench constantly quash convictions where the justices have erroneously supposed they had jurisdiction when they had not; and yet the decision of justices on such matters is quite as conclusive as the finding of an arbitrator on a submission. The case of Mitchell v. Staveley (b) shews that it is a good plea to an action on a bond conditioned to perform an award, that there were other matters submitted which the arbitrator has omitted to award upon, although that fact does not appear upon the face of the award. They referred also to Vin. Abr. tit. "Arbitrament," (D 6 and 7)]. At any rate, if the Court entertains the least doubt upon the validity of the award, they will leave the plaintiff to his remedy by action, and not preclude the defendants from any appeal by granting this summary application. Besides, a rule like the present has been always placed on the same footing as a rule for an attachment; and no rule for an attachment

⁽a) 3 M. & W. 120; S. C. 6 Dowl. 82.

⁽b) 16 East, 58.

will go against a corporation. [Alderson, B.—The Court exercises the same discretion in granting a rule of this kind, as if it were a rule for an attachment; but it would be a very strict application of that principle, to say that the Court would not make an order of this kind against a corporation.] A further objection to the present rule is, that the order of reference is not binding on the company; first, because an attorney as such, has no power to refer a cause; and, secondly, even if he had, there was no sufficient appointment of the attorney by the company in the present An attorney is authorized to act as the agent of a party in Court to prosecute or defend an action in the Court, and he has no authority to remove the cause from the tribunal in which it is, and to substitute by consent a totally different mode of trying it. They referred to Filmer v. Delber (a)]. Besides, even supposing that he had, in the case of an ordinary defendant, any such authority; here the defendants are a corporation, and can only be bound by an instrument under the corporate seal. It appears that the attorney was not appointed by deed, but merely by a verbal authority from the chairman of the Court of directors. [They referred to Rex v. The City of Chester (b); Biddell v. Dowse (c). Alderson, B., referred to Bayley v. Buckland (d).]

FAVIELL

5.
EASTERN
COUNTIES
RAILWAY CO.

The Attorney General, in support of the rule. According to the terms of the Judge's order, the reference was of "the claims of the plaintiff in the action;" and the affidavits shew that the sum in dispute was included as a debt in the plaintiff's particulars; and, therefore, that the question really was, whether debt or no debt. The attorney must be taken to be properly appointed, as the company had clear notice of his having acted as attorney, without interfering. [He was then stopped by the Court.]

⁽a) 3 Taunt. 486. & R. 404. (b) Skin. 154; S. C. 2 Show. (d) 1 Exch. 1; S. C. ante, vol. 5, p. 115.

⁽c) 6 B. & C. 255; S. C. 9 D.

FAVIELL

EASTERN
COUNTIES
RAILWAY CO.

Pollock, C. B.—The question before the arbitrator in this case was, whether the claim in question was one of the "claims of the plaintiff in the action;" and he has decided that it was. He has, therefore, decided upon a question expressly referred to him, and his decision cannot now be questioned.

ALDERSON, B.—I was at first much struck by the argument that the arbitrator could not decide the question of the extent of his own jurisdiction, and I still think that is But here the reference was of all "claims in the action," and the affidavits expressly shew that the plaintiff claimed this sum as a debt before the arbitrator, and that the arbitrator entertained the question. The defendants, if they apprehended that the arbitrator was about to exceed his jurisdiction, should have applied to a Judge to revoke They did not, however, do so, but made the submission. the question one for his determination; and he has determined it. As to the other point, it would be a grievous hardship on parties suing a corporation, if they were obliged in all cases to inquire whether the attorney for the corporation was appointed under seal.

ROLFE, B., concurred.

PLATT, B.—I am of the same opinion. Where an attorney has been duly authorized to appear for a litigant party, he has incidentally authority to conduct the cause, and to refer it. If he acts without authority, and the client is injured, he has a remedy by action against the attorney. Here the attorney in fact appeared for the company; they had notice that he had done so, and did not interfere. I think, therefore, they are estopped from saying that he was not properly authorized to appear for them.

Rule absolute.

1848.

TURNER v. The METROPOLITAN LIVE STOCK COMPANY.

THIS was a rule calling upon a party therein named, to The affidavits shew cause why execution should not issue against him, as a shareholder of the above company, under the 7 & 8 Vict. c. 110, s. 68 (a).

The affidavits upon which the rule was granted, shewed that the plaintiff had obtained judgment in the above action against the company, which was completely registered under the 7 & 8 Vict. c. 110. There was a certified copy of the return of the names of shareholders, amongst which the

(a) 7 & 8 Vict. c. 110, s. 68. "That in the cases provided by this act for execution on any judgment, decree, or order in any action or suit against the company, to be issued against the person or against the property and effects of any shareholder or former shareholder of such company, or against the property and effects of the company, at the suit of any shareholder or former shareholder, in satisfaction of any monies, damages, costs and expenses paid or incurred by him as aforesaid in any action or suit against the company, such execution may be issued by leave of the Court, or of a Judge of the Court, in which such judgment, decree, or order shall have been obtained, upon motion or summons for a rule to shew cause, or other motion or summons consistent with the practice of the Court, without any suggestion or scire facias in that behalf; and that it shall be lawful for such Court or Judge to make absolute or discharge such rule, or allow or dismiss

such motion, (as the case may be), and to direct the costs of the application to be paid by either party, or to make such other order therein as to such Court or Judge shall seem fit; and in necessary that such cases such form of writs of execution shall be sued out of plication for the Courts of law and equity rethe Courts of law and equity re-spectively for giving effect to the 68th section, provision in that behalf aforesaid should be as the Judges of such Courts re- personal. spectively shall from time to time think fit to order; and the execution of such writs shall be enforced in like manner as write of execution are now enforced: provided that any order made by a Judge as aforesaid may be discharged or varied by the Court. on application made thereto by either party dissatisfied with such order: provided also, that no such motion shall be made, nor summons granted, for the purpose of charging any shareholder or former shareholder, until ten days' notice thereof shall have been given to the person sought to be charged thereby."

a rule under the 7 & 8 Vict. c. 110, s. 68, need not positively state that the party is a shareholder of the company. It is sufficient if they shew that his name appears in a certified copy of the return of the names of the shareholders, made under the 18th section.

Nor is it the rule, reTURNER

TURNER

METROPOLITAN LIVE
STOCK CO.

name of the party called upon by the present rule was to be found; and it was sworn that he was the party therein named: but there was no affidavit that in point of fact he was a shareholder, nor was there anything to shew that he had sanctioned the return. It appeared that the notice of the application for the rule, required by the 68th section, had not been personally served on the party.

Bramwell shewed cause. The materials upon which this rule has been obtained are insufficient. This is a new form of rule under the 7 & 8 Vict. c. 110, s. 68, which renders a suggestion or scire facias unnecessary. party has no opportunity of afterwards trying the question whether or not he is a shareholder, and the decision of the The Court will therefore require the Court is final. plaintiff to shew by direct and positive allegation, that the party he seeks to charge is beyond any doubt a shareholder. All that the plaintiff has done here, is, to shew that upon the face of the return the party's name appears as a shareholder. He should have sworn positively that he is a shareholder. In the Banking Companies' Act, 7 Geo. 4, c. 46, there is a provision in the 6th section, that the returns of the names of proprietors shall be received in evidence as proof of the fact that the persons named therein, were members thereof at the date of such account or return. There is no similar provision in the act now under consideration. The 7 & 8 Vict. c. 110, s. 18, only makes the copy of the return receivable in evidence, without proof of the signature of the registrar, or of the seal of office affixed thereto. Besides, the notice required by the 68th section ought to have been personally served.

Gray, in support of the rule, was not called upon.

PER CURIAM.—The return here is made in performance of a public duty, and the question is, whether it is not sufficient primâ facie evidence that the party is a share-

holder, where he has an opportunity of denying it and does not do so. It is not as if the question were whether this was sufficient evidence for a jury; for the Court often acts on information and belief. As to the service of the notice, the act which requires it says nothing as to its being personal service. The party is to have ten days' notice so brought home to him, that he may be enabled to appear.

TURNER

V.

METROPOLITAN LIVE
STOCK CO.

Rule absolute.

COURT OF COMMON PLEAS.

Trinity Term.

IN THE ELEVENTH YEAR OF THE REIGN OF VICTORIA.

1848.

Where the maker of a

under the

Ann. c. 9,

ment, the

a right of

the maker; and, there-

Brown v. De Winton.

CHANNELL, Serjt., and Atherton, shewed cause against a rule obtained by Byles, Serjt., calling on the plaintiff note made it payable to his to shew cause why, in the alternative, a verdict should not own order, and indorsed be entered for the defendant, or judgment be arrested. it in blank, it was held that was an action of assumpsit, and the declaration contained the instrument a count, which was the only material one, in the following was not a promissory note negotiable form: - "That the defendant, on the 11th of September, 1845, made his promissory note in writing, and thereby statute 3 & 4 promised to pay to his, the defendant's own order, 75L for s. 1: but that value received, two months after the date thereof, which by the indorseperiod had elapsed before the commencement of the suit, holder obtained and the defendant then indorsed the same to the plaintiff, action against whereof the defendant had due notice, and then in con-

fore, where a declaration described such an instrument as a "promissory note," it was held that although it might be bad on special demurrer, yet the defendant having pleaded over, the objection was not available in arrest of judgment; and although an allegation in the declaration, that the defendant had "indorsed" the instrument, might be objectionable on special demurrer, it was not available in arrest of judgment.

sideration of the premises, promised to pay the amount of the said note to the plaintiff, according to the tenor and effect thereof." The defendant traversed, first, the making, and, secondly, the indorsing of the note. At the trial, before *Erle*, J., the following instrument was produced:—

BROWN
DE WINTON.

London, September 11th, 1845.

"751. Two months after date I promise to pay to my own order the sum of 751 for value received.

C. L. DE WINTON, Lieut. 16th Regt.

To Sir J. Kirkland & Co., 80, Pall Mall, London."

Indorsed "C. L. DE WINTON, Lieut. 16th Regt."

It was objected that this was not a promissory note within the provisions of the statute of 3 & 4 Ann. c. 9, and, consequently, that the plaintiff could not sue upon it. A verdict was taken for the plaintiff, with leave to the defendant to move to enter a verdict for himself, if the Court should be of opinion that he was entitled so to do. A rule for that purpose was obtained accordingly. The question was, whether the note as declared on was one on which the plaintiff was entitled to recover. The plaintiff contended that it was. That would of course depend upon the language of the 3 & 4 Ann. c. 9, s. 1. No doubt the preamble of that statute only referred to notes in writing promising to pay "unto any other person," but the enacting part of the section contained much more extensive language. The first part of the enacting clause was only co-extensive with the preamble, but in the second part, language was used which would embrace such an instrument as the present, as it provided for notes "payable to any person or persons." Those words would clearly extend to such a note as that on which the present action was brought, it being made payable to the maker's own order. With respect to the authorities as to the construction to be put BROWN

DE WINTON.

upon the statute, they were conflicting. Thus, in Flight v. M'Lean (a), the Court of Exchequer held that the statute did not apply to such instruments as the present. That, however, was a decision in Michaelmas Term, 1846, and in Wood v. Mytton (b), the Court of Queen's Bench held that the statute did apply to such an instrument. That was a decision in Trinity Term, 1847. The later authority, therefore, was in favour of the plaintiff. In passing the statute, the object, which the Legislature had in view, was to amend the state of the law previously existing. appeared by the decision in the case of Clerke v. Martin (c), which determined that a promissory note payable to J. S., or order, was not a negotiable instrument within the custom of merchants. The case of Buller v. Crips(d) was to the same effect. Such a state of the law was found very inconvenient in commercial transactions, and, therefore, "to the intent to encourage trade and commerce, which will be much advanced if such notes shall have the same effect as inland bills of exchange, and shall be negotiated in like manner," the statute passed. In Brown v. Harraden (e), the Court held that both inland bills of exchange and promissory notes were, since the statute, to be considered on the same footing in all respects, in order the more efficiently to serve the purposes of commerce. The statute, therefore, ought to receive a liberal construction. Such instruments as the present were in very general use, and great inconvenience would result if they were held not to be within the meaning of the statute.

Byles, Serjt., and Peacock, in support of the rule. In the conflict of authorities as to the proper construction to be put upon the statute, the Court must refer to the language of the statute itself. It would then appear that the

⁽a) 16 M. & W. 51.

⁽d) 6 Mod. 30; S. C. 1 Salk.

⁽b) Since reported, 10 Q. B. 805. 130.

⁽c) 2 Ld. Raym. 757.

⁽e) 4 T. R. 148.

view taken by the Court of Queen's Bench in its decision was inconsistent with the third enacting clause in the first section of the statute, for, by that it was provided, "that the person or persons, body politic and corporate, to whom such sum of money is, or shall be, by such note made payable, shall and may maintain an action for the same in such manner as he, she, or they might do upon any inland bill of exchange made or drawn according to the custom of merchants, against the person or persons, body politic and corporate, who or whose servant or agent as aforesaid, signed the same." The effect of the construction, therefore, adopted by the Court of Queen's Bench, would be to enable, by means of this clause in the section, the maker to bring an action against himself. That shewed the construction to be unreasonable. Supposing that the instrument on which the plaintiff had here declared could be construed as an instrument payable to bearer, then it was not so described in the present declaration. pleading, however, instruments should be described according to their legal effect; Baker v. Lade (a); 2 Wms. Saund. 97 f, 6th ed.

Cur. adv. vult.

COLTMAN, J., now (b) delivered the judgment of the Court (c).—This was an action of assumpsit, in which the plaintiff in the first and only material count of his declaration stated that the defendant, on, &c., made his promissory note in writing, and thereby promised to pay to his, the defendant's own order, 75L, for value received, two months after the date thereof, which period had elapsed before the commencement of the suit; and the defendant then indorsed the same to the plaintiff; whereof the defendant then had notice; and then in consideration of the

VOL. VI. P D. & L.

BROWN

DE WINTON.

⁽a) 3 Lev. 291. (c) Coltman, J., Maule, J., (b) In the Vacation after Crosswell, J., and Williams, J. Trinity Term.

BROWN

DE WINTON.

premises, promised to pay the amount of the said note to the plaintiff, according to the tenor and effect thereof. To this count the defendant pleaded, first, that the defendant did not make the said promissory note in manner and form, &c. Secondly, that the defendant did not indorse the said promissory note in manner and form, &c.; with other pleas not material to be adverted to. the trial, it appeared that the note was a note drawn payable to the order of the maker, and indorsed by him in blank. A verdict was found for the plaintiff, but with leave reserved for the defendant to enter a verdict, if the Court should think the verdict ought to be entered for him. In the ensuing Term, my Brother Byles moved for and obtained a rule nisi in the alternative for entering a verdict for the defendant, or for arresting the judgment; and on the argument before us, it was insisted that the note in question being made payable to the order of the maker, was not a promissory note within the statute 3 & 4 Ann. c. 9, and, if so, it was contended that the plaintiff could maintain no action upon it. On the proper construction to be put on this statute, the Court of Queen's Bench and the Court of Exchequer have differed; Wood v. Mytton (a); Flight v. M'Lean (b); Hooper v. Williams (c). In this conflict of authorities it is necessary to examine minutely the provisions of the act having regard to the nature of the instrument referred to. In considering them with reference to the question in this cause a doubt arises whether, if a man makes a note payable to his own order, he can with any propriety of language be said to have made a promissory note at all. It is true that no precise form of words is requisite to constitute a promissory note, still it ought to have the essentials of a contract. Now, no man can make a contract with himself; there ought to be two parties to a contract: Champion v. Plummer (d); and, in case of a promissory

⁽a) Since reported, 10 Q. B. 805.

⁽c) Since reported, 2 Exch. 13.

⁽b) 16 M. & W. 51.

⁽d) 1 New Rep. 252.

note, there ought to be a promiser and a promisee. indeed, not necessary that the payee of a note should be expressly named; Green v. Davies (a); Chadwick v. Allen (b); but the person to whom the money is to be paid ought at least to appear by implication, as in the cases just cited. The Legislature may indeed make use of a term in a sense not strictly appropriate to it, but it is to be presumed, till the contrary appears, that the terms made use of are intended to bear their appropriate meaning. Primâ facie, then the statute, when it speaks of promissory notes, ought to be understood to mean what answers to the proper notion of a promissory note, that is to say, an instrument by which one man promises to pay some one else a sum of money. Now, is there in the act anything to shew that the Legislature had in contemplation, amongst others expressly referred to, notes payable to the maker's own order? The first section of the statute, as was observed in the case of Wood v. Mytton, consists of a preamble and four enacting Looking first to the preamble, we see that it expressly refers to notes payable to another person, or his When we look at the enacting clauses, the description of notes referred to is enlarged, the first clause referring to notes payable to "any other person," "his, her, or their order, or unto bearer," but not comprising notes payable to the order of the maker. The second clause requires a more particular examination; it runs thus:-- " every such note payable to any person or persons," "his, her, or their order, shall be payable or indorsable over in the same manner as inland bills of exchange may be." Now, the word "such" is a word of reference which cannot, by the ordinary rules of construction, be understood as referring to any other notes than such notes as had been mentioned before. is said, however, and truly said, that the phraseology in the second clause differs from that of the first, the words

BROWN

DE WINTON.

BROWN
P.
DE WINTON.

"any person" being substituted in place of the words "any other person," and the words "any person," it is said, may well include the maker himself; but the words of the clause are, notes "payable to any person or persons," "his, her, or their order:" now, a note payable simply to the order of the maker cannot with propriety be said to be payable to any person whatever, for to whom is it payable? Not to the maker, for it does not purport to be so; nor yet to any other person: it imports, in fact, no existing obligation to pay money to any person whatever; and if lost or stolen before indorsement, and afterwards circulated, can in no way bring a charge on the maker. If we proceed to the third clause, we find that it has reference in terms perfectly general to "the person or persons" "to whom such money is or shall be by such note made payable." Now, what are the notes here referred to by the words "such notes?" Those words are equivalent to notes before mentioned, and the clause ought to be understood as referring to the notes mentioned in the preceding clause, or at least as including them; and, therefore, the provisions of the third clause may furnish a further key for determining the question what description of notes are included in the second clause. Now, the provisions of the third clause are, "that the person or persons" "to whom such sum of money is or shall be by such note made payable, shall and may maintain an action for the same" "against the person or persons" "who signed the same." Such a provision is clearly inapplicable to a note made by the maker payable to his own order, since it is impossible for him to sue himself. It follows that the third clause is not intended to comprise within it notes payable to the order of the maker; and if the third clause includes within it, as we think it does, all the notes mentioned in the second clause. that clause also ought to be understood to have reference only to notes on which the maker is liable to be sued by the payee or the bearer. It seems to us, therefore, that the act of Parliament in speaking of promissory notes, is to

be considered as referring to notes payable to the order of some other person than the maker, and to notes payable to bearer, but not to notes payable to the order of the maker. An instrument so drawn is an incomplete instrument, being in the nature of a conditional engagement in case he should afterwards indorse the note to pay it to the person to whom by such indorsement he should direct it to be paid. Such an instrument is of no legal binding effect till something further is done to give it validity.

It is another question what is the nature of such an instrument after it has been indorsed and put into circu-As no particular form of words is essential to form a valid promissory note, such an instrument, if indorsed I. S. or order, imports a promise to pay I. S. or order the money therein mentioned; and if the maker of such a note indorses it in blank, and circulates it, he must, we think, be considered as engaging to pay the amount to any person who may be the lawful holder of it for value; that is, in effect, to the bearer. It must be taken as against the person indorsing such an instrument that he intended it to be a valid instrument when he paid it away, and that his indorsement should have the same effect as the indorsement by the payee of a note payable to the order of a person other than the maker, would have.

It remains to consider what is the result as far as the present case is concerned. In order to decide whether the verdict for the plaintiff is right, we must consider, first, what the declaration means. It alleges that the defendant made his promissory note in writing, and thereby promised to pay to his own order 75L, and that the defendant indorsed it to the plaintiff. The first of these two allegations is open to the objection that there is an inconsistency in calling that a promissory note which appears not to be one, and this might have been a ground of demurrer, but the defendant having pleaded over to it, it must have a reasonable construction put upon it; and though the words "promissory note" are inappropriate, yet

BROWN
v.
Dr. WINTON.

BROWN

BROWN

DE WINTON.

coupling them with the explanation given by the subsequent part of the allegation, which shews in what sense the words "promissory note" are used, they are intelligible, and the allegation will be taken to mean that the defendant made a note in writing, containing a promise to pay his own order 751. The plea denies that the defendant made the said promissory note in the declaration mentioned. traverse must be understood as denying the making a promissory note in the same sense in which the declaration alleges it, and the evidence proved that such a note as is alleged was actually made. The second allegation is that the defendant indorsed the said note to the plaintiff. Now, what must be understood to be the meaning of this allegation when pleaded over to. The term "indorsing" may not be strictly applicable to an instrument not properly indorsable over; but not being demurred to, it may be understood in any sense the words will bear, which will make the pleading good. In the case of bills or notes which are indorsable, the allegation that the defendant indorsed the bill to the plaintiff, means that he indorsed the bill under circumstances which gave the plaintiff a right to sue upon it; Marston v. Allen (a); Adams v. Jones (b); and the allegation in this declaration respecting the indorsement may well bear this sense, and the plea, when it denies the indorsement, must be understood in the same sense. Now, the fact of indorsing the note in blank and delivering it to the defendant was proved, and if the right to sue was thereby vested in the plaintiff, the verdict was properly found for him. The question then stripped of all technicality comes to this—can the maker of such a note, by indorsing it, give a right of action to the indorsee; and, on the grounds already pointed out, we are of opinion that he may. The verdict, therefore, which has been found for the plaintiff will stand. On the same ground the motion to arrest the judgment must fail. The allegations on the

record shew substantially, if not in correct technical form, the true facts of the case, and those facts, as we have already intimated, do, we think, shew a title in the plaintiff to recover.

1848. BROWN DE WINTON.

Rule discharged (a).

(a) See Gay and Another v. Lander, post, p. 75.

TIBALDI v. ELLERMAN.

C. W. WOOD shewed cause against a rule obtained by To a decla-Lush, for setting aside a demurrer to a replication de ration on a bill injuria, on the ground of its being frivolous. It was an by the drawer action of debt by the drawer of a bill of exchange against acceptor, the The defendant pleaded, that before the defendant pleaded that the acceptor. drawing and accepting of the said bill of exchange in the declaration mentioned, and before and at the time of the given in disdrawing and accepting of the said bill of exchange hereinafter next mentioned, to wit, on the 14th day of December, A. D. 1847, the plaintiff and the defendant were in copartnership in a certain patent, to wit, a patent for deodorising and disinfecting night soil, and were then jointly interested in the working and carrying out the same; and that it purposes, and the proceeds was then agreed that the plaintiff should draw, and the of which were defendant accept, a certain other bill of exchange, dated and that the the said 14th day of December, 1847, whereby the de- partnership accounts had fendant promised to pay to the order of the said plaintiff not yet been 2081. 10s. on the 30th of January, A.D. 1848, to enable Semble, that the plaintiff to raise money thereon; and that the proceeds should then be delivered to the defendant, and be applied cation to such a plea. by him to the purpose of working and carrying out the said patent; and the defendant further saith, that the proceeds of the said last mentioned bill amounted, to wit, to the sum of 2004, and that the defendant did, in pursuance of the said agreement, then apply the same to the working

of exchange against the the bill dewhich was given in discharge of a previous bill, partnership

TIBALDI

".
ELLERMAN.

and carrying out of the said patent, and to no other purpose. And the defendant further saith, that when the said last mentioned bill became due and payable, to wit, on the 3rd of February, A.D. 1848, it was further agreed between the plaintiff and the defendant, that the plaintiff should draw and the defendant accept, and the plaintiff did then draw, and the defendant did then accept, a certain other bill of exchange, dated the said 3rd day of February, in the year of our Lord 1848, whereby the defendant promised to pay to the order of the plaintiff the sum of 214L 10s. two months after the date thereof. And the defendant further saith that it was then, to wit, on the said 3rd day of February, A. D. 1848, further agreed between the plaintiff and the defendant, that the said last mentioned bill of exchange should be taken and received, and the same was then taken and received by the plaintiff from the defendant in full satisfaction and discharge, and in lieu of the said bill of exchange, dated the 14th day of December, A. D. 1847 as aforesaid; and that there was never any value or consideration for the defendant accepting the said bill of exchange, dated the 3rd day of February, A.D. 1848, or for the payment of any part of the amount thereof by him to the plaintiff, except as aforesaid. And the defendant further saith, that afterwards and before the commencement of this suit, and when the said last mentioned bill became due and payable, to wit, on the 6th day of March, A.D. 1848, it was further agreed by and between the plaintiff and the defendant, that the plaintiff should draw and the defendant accept, and the plaintiff did then draw, and the defendant did then accept, the said bill of exchange in the said declaration mentioned, and that the same should be taken and received, and the same was then taken and received by the plaintiff from the defendant in full satisfaction and discharge, and in lieu of the said bill of exchange, dated the said 3rd day of February, 1848, as aforesaid. And the defendant further saith that there never was, at any time, any value or consideration for the said defendant's accepting the said bill

of exchange in the said declaration mentioned, or for his paying any part of the amount thereof to the plaintiff, except as aforesaid. And the defendant further saith, that the accounts of the said copartnership were, at the time of the accepting of the said bill of exchange in the said declaration mentioned, and still are, open and unsettled, and unbalanced. The plaintiff replied de injuriâ. afterwards added the similiter, and having made up the issue, delivered it to the defendant. Subsequently the latter returned the issue, with the similiter struck out, and then demurred specially to the replication, as not being proper to the plea. It was to set aside that demurrer that the present rule was obtained. It was contended that the replication of de injurià to the defendant's plea was improper, according to the resolutions in Crogate's case (a). That replication could only be good where matter of excuse was alleged in the plea. It could not, however, be said here that any excuse was set up for the non-performance of the promise, as the defendant claimed an interest in the money, and that he ought not to pay until an account had been taken. That, therefore, rendered the case analogous to Solly v. Neish (b), where a similar plea was held to amount to the general issue, and, therefore, to The fact of this plea being open to such an objection, did not render the replication de injurià good. In Gregory v. Hartnoll (c), to a declaration for money paid, the defendant pleaded that the money was paid in respect of the defendant's share in certain damages and costs recovered against the plaintiff as part owner of a vessel, the defendant being another part owner, for the loss of goods occasioned by the negligence of the plaintiff's servants, but that in fact the loss was owing to the plaintiff's own negligence. There, the Court held the plea to amount

(a) 8 Rep. 67. (c) 4 Dowl. 695; S. C. 1 M. (b) 4 Dowl. 248; S. C. 2 C., & W. 183. M. & R. 355.

TIBALDI

TIBALDI

ELLEBMAN.

TIBALDI

U.
ELLERMAN.

to the general issue. In Whittaker v. Mason (a), where the plea was bad as amounting to the general issue, the Court held the replication de injurià bad; and Tindal, C. J., in delivering the considered judgment of the Court with regard to the applicability of such a replication, said, "it is clear that it can only be applicable where the plea states matter which admits the promise as laid in the declaration, and excuses its non-performance." Here, the plea clearly amounted to the general issue. Maule, J.—The new rules of pleading which are made under the authority of an act of Parliament, say that there shall be no such plea as non assumpsit to a declaration on a bill of exchange. If, therefore, the defendant had pleaded non assumpsit to this action, judgment must have been given for the plaintiff on account of the badness of the plea. The defendant, therefore, was obliged to adopt this mode of pleading in order to shew that he was not liable upon the bill. What he states amounts to an excuse for the non payment of the bill. That being so, the replication is sufficient.] In Schild v. Kilpin (b), the Court treated a plea similar to the present as a plea in discharge. [Maule, J.—In that case, the Court decided, on the ground that the plea amounted to a denial, that the defendant had been guilty of a breach by the non payment of the bill. In the present case, however, the defendant seeks to excuse himself, by stating that he never was under any obligation to pay, not that he never promised Wilde, C. J.—The substance of the plea is, that there was a want of consideration for the bill, and, therefore, that the defendant is not liable to pay. The bill is entirely independent of the partnership account. Maule, J.—There is no interest in the bill, claimed by this plea.

C. W. Wood then prayed leave to amend.

⁽a) 2 Bing. N. C. 359; S. C. 2 Scott, 567; 6 Dowl. 429.

⁽b) 8 M. & W. 673; S. C. 9 Dowl. 843.

Leave was then granted accordingly, the issue and notice of trial delivered to stand, on payment of costs by the defendant of the amendment and of this application.

1848. TIBALDI

Rule accordingly.

GAY and Another v. LANDER.

BOVILL shewed cause against a rule nisi obtained by A declaration J. Henderson, for arresting the judgment in the present It was an action of assumpsit, and the declaration promissory stated that the defendant, on the 8th of March, 1845, made that he made his promissory note in writing, and thereby promised to pay to the order of him, the said defendant, the sum of 500L for value received, six months after the date thereof, it to 8. & Co., which period had elapsed before the commencement of the it to the plainsuit; and the defendant then indorsed the said note to certain other persons using and trading under the name, style, and firm of Smith & Co.; and the said persons so using the name, style, and firm of Smith & Co., indorsed the said note to the plaintiffs, and the defendant then, in consideration of the premises, promised the plaintiffs to pay the amount of the said note, &c. The defendant did not traverse any of the allegations contained in the declaration, but put several pleas in confession and avoidance on the record. Issue was joined on those pleas, and all were found in favour of the plaintiff. The present rule to be a valid that it appeared on the face of the declaration that the to S. & Co., instrument on which the defendance. promissory note negotiable according to the provisions of claration would the statute 3 & 4 Ann. c. 9, s. 1. It was submitted that

against the maker of a note alleged the note payable to his own order and indorsed who indorsed on motion to arrest the judgment, that although the instrument was not, in point of law, a promissory note within the 3 & 4 Ann c. 9, s. 1, but a note payable to bearer; yet as against the maker who had indorsed it, it must be taken or order; and, consequently, that the deonly be open to a special demurrer for not correctly

setting out the legal effect of the instrument.

GAY and Another v.

the provisions of the statute of Anne did apply to the note stated on the face of the declaration. The note must be considered either as payable to another, or as payable to In either case, it was a negotiable instrument within the meaning of the statute. The declaration alleged that the note was "indorsed" to the plaintiffs. And it appeared by Allen v. Walker (a), that every indorsement was a new making. Being therefore indorsed to the plaintiffs, it must be considered as made in their favour, and, therefore, made in favour of another person, within the express provisions of the statute. And the case of Marston v. Allen (b) shewed that the meaning of indorsing a negotiable instrument was writing the name of the indorser upon it, and delivering it, with intention to transfer the property in it. The declaration, therefore, alleged a making of the note in favour of another, and indorsing it to that other, with intention to transfer a title to it. If, however, it should be thought that this was not the strict construction to be put upon the note, as described in the declaration, it was clearly, in point of law, a note payable to bearer. Whether the declaration would have been bad on special demurrer, for not setting out the instrument according to its legal effect, need not now be considered, as the defendant had pleaded over, and the present application was to arrest the judgment. If it appeared that the instrument as set out was, in point of law, within the meaning of the statute, the informality in the pleading was immaterial.

J. Henderson, in support of the rule. The statute of Anne applied properly to notes payable to other persons than the maker, named on the face of the instrument, or to notes payable to bearer. On the face of the declaration here, however, it appeared that the note was payable to

⁽a) 5 Dowl. 460; S. C. 2 M. & W. 317.

⁽b) 1 Dowl. 442, N. S.; 8 M. & W. 494.

the order of the maker, which it was held in the case of Smith v. M'Clure (a), was payable to the party himself. Such an instrument could not come within the meaning of the statute, for, if it did, then, according to the third clause in the section, the maker would be enabled to sue himself, which was impossible in point of law. Then, if it was not to be treated as promising payment to the maker himself. it did not point out any specific person to whom payment was to be made; and so, according to the case of Blancken. hagen and Another v. Blundell (b), it did not come within the meaning of the statute. It was there held, that a note whereby the maker promised to pay to A. or to B. and C. a sum specified therein for value received, was not a promissory note within the meaning of the statute of Anne. Or, if on the other hand the note was to be considered as a note payable to bearer, it was improperly described in the declaration. No doubt it had been held, in Gibson v. Minet (c), that a note payable to a fictitious person might be treated as a note payable to bearer, but there the fact of its being so payable to a fictitious person was set forth in the declaration. So here the note ought to have been described as payable to bearer. If not so described, there was nothing to shew that it was a negotiable instrument within the meaning of the statute. If it did not so appear, the declaration was bad in arrest of judgment.

GAY and Another F. LANDER.

1848.

Cur. adv. vult.

COLTMAN, J., delivered (d) the judgment of the Court (e).—In this case a motion was made to arrest the judgment. The declaration stated that the defendant made a promissory note, and thereby promised to pay to his own order 500L six months after date, and then indorsed

⁽a) 5 East, 476; S. C. 2 Smith,

⁽b) 2 B. & A. 417.

⁽c) 1 H. Bl. 569.

⁽d) In the Vacation after Trinity Term.

⁽e) Coltman, J., Maule, J., Cresswell, J., Williams, J.

GAY and Another v.
LANDER.

it to Smith & Co., who indorsed it to the plaintiffs. The defendant pleaded several pleas, on which issues were joined, all of which were found for the plaintiffs. hearing of the motion in arrest of judgment, the general line of argument with respect to the statute of Anne was referred to, which had been fully discussed in the case of Brown v. De Winton (a), and which it is not necessary to advert to in this case with particularity, as we have expressed our opinion upon it at length in giving judgment in that In the case of Brown v. De Winton, this Court held, in conformity with the judgment of the Court of Exchequer in the case of Hooper v. Williams (b), that if a man makes a note payable to his own order, and afterwards indorses it in blank, and circulates it, it thereby becomes a valid note payable to bearer. But it was contended, on the hearing of this motion in arrest of judgment, that however the case might be when the note was indorsed in blank, the first indorsement in this case must be taken to be a special indorsement, making the note payable to Smith & Co. only, not to them or their order, and that they could not indorse to the plaintiffs. But we think that the principle on which the case of Brown v. De Winton was decided will extend to this case. The principle on which that case was decided is, that the note, before it was indorsed, was in the nature of a promise to pay to the person to whom the maker should afterwards, by indorsement, order the amount to be paid; and that after the note is indorsed and circulated, it must be taken as against the party so making and indorsing the note, that he intended that his indorsement should have the same effect that an indorsement by the payee of a note payable to the order of a person other than the maker would have had. Now, it is well established. that if a note be made payable to J. S. or order, and J. S. in such case indorses the note specially to Smith & Co., without adding "or order," Smith & Co. may convey a

good title to any other person by indorsement; More v. Manning (a); Edie v. East India Company (b). therefore, that the effect of so making and indorsing the note in question, was to make it as against the maker and indorser a valid promissory note, payable to Smith & Co., or order; and, therefore, that the declaration is open only to an objection on special demurrer, for not setting out correctly the legal effect of the instrument. The rule for arresting the judgment must, therefore, be discharged.

1848. GAY and Another LANDER.

Rule discharged.

(a) Com. Rep. 311.

(b) 2 Burr. 1216.

PETERSON and Another v. DAVIS.

PATERSON shewed cause against a rule obtained by In order to Lush, calling on the plaintiffs to shew cause why so much of the final judgment signed in this case as related to costs should not be set aside, or why the plaintiffs should not be restrained from taking out execution for more than the amount of the debt recovered on the trial of this action, or why, upon payment by the defendant to the plaintiffs or their attorney of their costs of the said judgment, to be taxed by one of the Masters of the Court, the said judgment should not be set aside, and why the plaintiffs should scribe the particulars of the not forthwith carry in the record, and the defendant be at residence of liberty to enter a suggestion thereon to deprive the plaintiffs of their costs, the verdict found for the plaintiffs on the action being brought; the trial being for a sum not more than 201, and for the and, therefore, recovery of which a plaint might have been entered in the merely stating

fendant to enter a sugestion under the London County Court Act, 10 & 11 Vict. c. lxxi. s. 113, it is necessary that the affidavits supporting the application sbould dethe defendant at the time of an affidavit fendant dwelt

in the city of London, without giving the particulars of his address, was held insufficient.

It is competent for a Judge at Chambers to entertain an application to enter a suggestion, but the refusal of the Judge is not conclusive on the defendant so as to prevent him from applying to the Court for the same purpose.

PETERSON and Another v. Davis.

Sheriff's Court of the city of London, pursuant to the local act 10 & 11 Vict. c. lxxi. It appeared from the affidavit sworn by the clerk to the defendant's attorney, that it was an action for goods sold and delivered, and was commenced on the 14th of March last. A writ of trial was afterwards obtained, and the cause was tried before the secondary, when the plaintiffs obtained a verdict for the sum of 121. 3s. 6d. In order to shew that the case came within the jurisdiction of the Sheriff's Court, established by the 10 & 11 Vict. c. lxxi, the affidavit stated that "the defendant is a merchant, carrying on his business at No. 133, Fenchurch Street, in the city of London, where the said writ of summons was directed and was served, as this deponent has been informed and believes; and this deponent further saith, that the said defendant, before and at the time of the issuing of the said writ of summons, dwelt and carried on his business in the city of London aforesaid, with which the said plaintiffs were well acquainted." "That the plaintiffs ought to have entered their plaint for the recovery of the said sum of 12L 3s. 6d., both parties being, at the time the said action was brought in this honourable Court, resident within the jurisdiction of the said Court established within the said city of London, and the liberties thereof, for the more easy recovery of small debts and demands, pursuant to the said act of Parliament; and this deponent further saith, that the said plaintiffs, at the time of the commencement of this suit, did not dwell more than twenty miles from the said defendant, but, on the contrary, did dwell within the distance of one mile from the said defendant. And this deponent saith, that the said plaintiffs, at the time of the commencement of this suit, dwelt and carried on their business at No. 33, Poultry, in the said city of London, and the liberties thereof, and not more than twenty miles from the said defendant; and this deponent further saith, that the said defendant also dwelt and carried on his business as a merchant within the said city of London, and the liberties thereof, for upwards of six calendar months then next before the time of the commencement of this action, and that he has continued to carry on his business there." The words of section 112 were, "that all actions and proceedings which, before the passing of this act, might have been brought in any of her Majesty's superior Courts of record, where the plaintiff dwells more than twenty miles from the defendant, or where any officer of the Court, holden under the provisions of this act, shall be a party, except in respect of any claim to any goods and chattels taken in execution of the process of the Court, or the proceeds or value thereof, may be brought and determined in any such superior Court, at the election of the party suing or proceeding, as if this act had not been passed." Before entering into the question as to whether the affidavit on the part of the defendant shewed the parties to be properly within the jurisdiction of the Sheriff's Court, a preliminary objection might be taken which would shew that the defendant had no locus standi for making the present motion. An affidavit on the part of the plaintiffs shewed that the question as to the right to enter the suggestion by the defendant had already been disposed of at Chambers. A summons for that purpose was taken out on the day that the trial took place, which was heard before Coltman, J. On an objection being taken to the sufficiency of the affidavit, that learned Judge dismissed the summons. The application was renewed on amended affidavits, before two other learned Judges. They declined to interfere, on the ground that the matter had already been before Coltman, J. Whatever matters could be urged now in support of the present application to the Court were in existence and available at the time when the application to the learned Judge at Chambers was made, and, therefore, should have been presented to the learned Judge on that occasion. Whether those matters were presented or not, they were equally unavailable to the defendant on the present occasion. If they were presented, then the learned Judge had disposed of them, and, if they VOL. VI. D. & I..

PETERSON and Another v. Davis.

PETERSON and Another v. Davis.

were not presented, then the defendant had lost his opportunity for rendering them available, and, therefore, could not now bring them before the Court. He cited Reg. v. Great Western Railway Company (a); Rex v. Sheriff of Devon (b); and Thompson v. Becke (c). If it should be contended that the Judge at Chambers had no jurisdiction over the matter of this application, and, consequently, that his dismissal of the summons could not affect the right of the defendant to come to the Court, there was no ground for such an argument, for, at common law, the Judge had such a power; Rex v. Almon (d). No doubt if the statute had prescribed specifically that the application must be made to the Court or a Judge, the defendant must apply to that tribunal provided by the statute; but, in the present case, the statute was silent upon that subject. The Judges then retained the power which they possessed at common law to entertain such applications as the present at Chambers. Secondly, supposing the Court to be of opinion that the defendant was not precluded by the decision of the Judge at Chambers from making the present application, then it must be considered as too late. He should have made an application for the purpose to a Judge at Chambers, and had no right to defer the motion until the four first days of the present Thirdly, the affidavits on which the application was founded did not disclose sufficient facts to shew that the present was not one of the excepted cases wherein the jurisdiction of the superior Courts was preserved. The meaning of the words in the section "where the plaintiff dwells more than twenty miles from the defendant," was twenty miles from the defendant's "residence." Here, however, the defendant did not state his residence in the city of London, but merely described himself as carrying on business at No. 133, Fenchurch Street, in the city of

⁽a) 5 Q. B. 597; S. C. 1 D. & (c) 4 Q. B. 759; S. C. 1 D. & M. 49.

⁽b) 2 A. & E. 296.

⁽d) Wilmot's notes, 264.

London, and that he "dwelt in the city of London." was far too vague a statement to constitute a proper compliance with the provisions of the statute. Then it was quite consistent with the latter part of the affidavit, "that at the time of the commencement of this suit, the plaintiffs did not dwell more than twenty miles from the defendant, but, on the contrary, did dwell within the distance of one mile from the defendant;" that the defendant had walked at that time within a short distance of the plaintiffs' dwelling-house. It was in the affidavit in no way shewn with sufficient distinctness where the defendant did reside in the city of London, so as to enable the plaintiff to make inquiries upon the subject, and be prepared to answer the statement so made. If the defendant were permitted to enter the suggestion prayed for, it would be competent for the plaintiffs to traverse the material statements in it; but how could the plaintiffs, from the information disclosed by this affidavit, be prepared to support their side of the traverse, or determine whether it would be prudent to put that matter in issue. They certainly could not.

PETERSON and Another v. Davis.

Lush, in support of the rule. With respect to the first point, as to the jurisdiction of the Judge at Chambers to entertain an application to enter a suggestion, the practice had always been to make the application to the Court and not to a Judge at Chambers, although there was no provision contained in the act directing that the application should be made to the Court. Then with reference to the second objection that the application was too late, it appeared from Smith v. Temperley (a), that the proper time to make the application was within the first four days of the following Term. The Court, however, was not precluded from determining on the merits of the case, because the matter had been before a Judge at Chambers. The case of Pike v. Davis (b), was a clear authority to shew that

⁽a) Ante, vol. 4, p. 510; S. C. 16 M. & W. 273.

⁽b) 8 Dowl. 387; S. C. 6 M. & W. 546.

PETERSON and Another v. Davis.

where a Judge at Chambers, upon the hearing of a summons on affidavit, dismisses the summons upon the merits, the party may renew his application to the Court on additional affidavits. Then the cases of Baddley v. Oliver(a); Bond v. Bailey (b); Heale v. Erle(c); Johnson v. Beale (d), shewed that the suggestion might be entered even after judgment had been signed in pursuance of a certificate for speedy execution under the 1 Wm. 4, c. 7, and that the application might properly be made within the first four days of the ensuing Term. The question remained, whether the affidavit on the part of the defendant shewed that the case came within the meaning of the statute. If section 112 was read in connection with section 40 of the act, it would appear that the words "from the defendant," meant "from where the defendant dwelt or carried on his business." It was therefore sufficient if the defendant's affidavit shewed that the plaintiffs did not dwell more than twenty miles from the defendant's place of business. [Cresswell, J.—The language of section 112 clearly refers to the defendant's dwelling]. If, however, there was any conflict, as to whether the defendant did reside within the city of London as was stated in his affidavit, the Court would still permit the suggestion to be placed on the record, and the plaintiffs would then have an opportunity of traversing it. If, however, the defendant was not permitted to enter the suggestion, he would be precluded from having the matter inquired into.

WILDE, C. J.—In this case two questions arise. The first is, whether the defendant is precluded from making this application to the Court in consequence of his having made prior applications to a Judge at Chambers. From the affidavits, it appears, that the subject of the present

⁽a) 1 C. & M. 219; S. C. 1 Dowl. 598.

⁽b) 2 C., M. & R. 246; S. C. 3 Dowl. 808.

⁽c) 2 M. & W. 383; S. C. nom. div. 5 Dowl. 595.

⁽d) 5 M. & W. 276; S. C. nom. div. 7 Dowl. 487.

application was heard before a Judge at Chambers, and disposed of on the ground that the affidavit was insufficient to support the application. The two subsequent applications at Chambers were dismissed on the ground that the previous ones had been heard before a different Judge. The question, therefore, now is, whether those proceedings at Chambers preclude the defendant from repeating his application by the present motion. We are of opinion that they do not. Considering the great amount of business which the Judges at Chambers are called upon to dispose of to the best of their judgment at the time, it appears to the Court, that it would be very inconvenient if parties were to be finally bound by the determination at The next question is, whether the defendant has by his affidavit brought sufficient materials before the Court to shew that he is entitled to succeed in this application. It was incumbent on him to shew that he was resident in the city of London. But the mere statement that he was so resident without any more particular description of his place of abode is not enough; any more than it would be for a defendant to state that he resided in the county of York. Such a statement was a mere evasion of the meaning of the statute. It could give no substantial information to a plaintiff of the defendant's place of residence. affidavit, however, does state that his place of business is at 133, Fenchurch Street, and his affidavit also proceeds to state that the plaintiffs did not at the commencement of the suit dwell more than twenty miles from the defendant. We think, therefore, that the defendant is entitled to enter a suggestion, that the plaintiffs did not at the time of the commencement of this suit dwell more than twenty miles from the place where the defendant carried on his business. The rule, therefore, will be absolute for setting aside the judgment, on payment of the costs of the judgment, and to enter a suggestion in the terms already mentioned. application having been made within the first four days of the Term, and being in the nature of a motion to arrest the judgment, we think the defendant ought not to be pre-

PETERSON and Another v. Davis.

PETERSON and Another v.

judiced by the judgment having been regularly signed. The rule, therefore, will be absolute, without the costs of this application.

PER CURIAM.

Rule absolute accordingly (a).

(a) The suggestion as above permitted was entered on the roll. The plaintiffs demurred to it, and, in Trinity Term, 1849, (see post), judgment was pronounced in their favour.

In re MILLARD.

The Court directed the registrar to file the acknowledgment by a married woman pursuant to the 3 & 4 Wm. 4, c. 74, although it was doubtful whether there was not an erasure in the jurat of the affidavit of acknowledgment, it being certain that there was a rasure in it.

PEACOCK made an application to the Court for its direction to the registrar to receive and file an acknowledgment by a married woman in pursuance of the 3 & 4 Wm. 4, c. 74 (The Fines and Recoveries Act). The peculiarity of the case was, that in the jurat of the affidavit of acknowledgment, there was a rasure which might be an erasure. It was not, however, certain that anything had been erased from the jurat. The affidavit was made in Canada, and the jurat was in this form: "Sworn at Porthope, Canada West, by the above-named deponents, before me, J. Robertson." Robertson, it appeared, had placed his initials opposite to the erasure. It was the constant practice of the Court to receive affidavits in which alterations were made, but against which alterations, the officer before whom the affidavit was sworn had placed his initials.

PER CURIAM.—On examining the jurat, it certainly appears that a rasure has been made, but it is by no means clear that there is an erasure. Rasures are sometimes made merely to remove excrescences or grease spots. Under the circumstances, we think that the affidavit is sufficient and the registrar may file the acknowledgment.

Rule accordingly.

1848.

DOE dem. MARKS and Another v. Roe.

BRAMWELL shewed cause against a rule, obtained by On an appli-H. Hill, calling on the tenant of the premises sought to be the 1 Geo. 4. recovered to enter into the usual recognizances required by c. 87, s. 1, the 1 Geo. 4, c. 87. The sum mentioned in the rule as not include in that for which the tenant should give security was 2001 be given by The question was, whether this was not a greater amount the tenant, damages al-The annual leged to have than the practice of the Court warranted. rent of the premises was 551., and the statute required that by the tenant, the amount of the recognizance should be "a reasonable him, to the sum" to be fixed by the Court. In the present case, it was trade of the demised presought to include in the amount of the recognizance the mises. loss which it was anticipated would accrue to the business in consequence of the premises in question being shut up, and certain alleged dilapidations having been done to the premises. It was submitted, that the rule could not be made absolute to that extent. The statute, by section 2, provided that the jury might assess the amount of the mesne profits down to the time of the verdict, and then the right of the landlord to mesne profits, between the verdict and the delivering up of possession of the premises, was saved by a proviso in the section. This shewed that the Legislature contemplated that the sum to be recovered and the sum for which security was to be given was only what could properly be called mesne profits. The usual amount for which the recognizance was required was one year's rent, and a reasonable sum for costs.

H. Hill, in support of the rule. No doubt the annual rent of the premises was here only 55L; but the premises were rendered in a very dilapidated state in consequence of the tenant removing grates and allowing the premises to fall into a state of ruinous non-repair. Under the ordinary form of a declaration in trespass, damages for an injury to business might be recovered.

the Court will

Doe dem.
MARKS
and Another

WILDE, C. J.—How can mesne profits include any more than the value of the premises, and that it is stated to be 55l. annually.

MAULE, J.—Under the ordinary declaration in trespass for mesne profits, you could not recover more than the value of the premises.

CRESSWELL, J.—In *Dunn* v. *Large* (a), it was held, that in trespass for mesne profits after ejectment for the recovery of a house used as an inn, the plaintiff cannot recover the loss which he has sustained by the defendant shutting up the inn and destroying the custom, unless such damage be specially stated in the declaration.

It was then arranged between the parties that security should be given for the sum of 100L besides costs.

Rule accordingly.

(a) 3 Doug. 335.

WATERS v. HANDLEY.

Bills of exchange are within the jurisdiction of the County Courts established by the 9 & 10 Vict. c. 95.

Whether
the service of
a writ of summons issuing
out of the

NayLor moved for a rule to shew cause why a writ of prohibition should not issue to the Judge of the Clerkenwell County Court of Middlesex, prohibiting him from proceeding in the present case. The application was made on four grounds: First, the action was brought on a bill of exchange; secondly, the summons was not duly served on the defendant; thirdly, the Court had no jurisdiction, because the defendant had not resided within the jurisdiction of

County Court
is good, is a matter peculiarly for the decision of the Judge.
A summons issued under section 60, 9 & 10 Vict. c. 95, "by leave of the Court," need not state on the face of it that it was so issued.

the Court at any time within the six months previous to bringing the action; fourthly, because the summons did not state that it had been issued by "leave of the Court." Upon the first ground, it was contended, that very great doubt existed whether the jurisdiction of the Court extended to bills of exchange, because section 60, provided that where proceedings were not taken in the district wherein the defendant resided or carried on business at the time of bringing the action, or within six months previous to bringing the action, the summons might issue by leave of the Court "for the district" "in which the cause of action arose." Those words might be considered as properly restrictive of the Court's jurisdiction to those cases in which it could properly be said that the cause of action arose in some particular district; but bills of exchange were of such a nature, that it could not properly be said they were of any particular place, and therefore, not within the jurisdiction of any particular Court. Maule, J.—There is no doubt that bills of exchange come within the jurisdiction of the Court. Although the venue cannot be changed in an action upon a bill of exchange on the common affidavit, because the contract is nullius loci, that does not interfere with the jurisdiction of County Court]. The next objection was, that the service on the defendant was insufficient. The affidavit on the part of the defendant, shewed that the summons had been left at a particular house, but that house was not the house of the defendant. [Maule, J.—It has already been decided that the Judge of the Court is to determine whether the service of the process has been sufficient. Williams, J.—It has been decided that the proper course in such a case is for the defendant to go to the Judge of the County Court and shew to him that the service has been insufficient]. Then the third objection was that the defendant did not reside in the Clerkenwell district, nor had he resided there within six months previous to entering the plaint. The summons, it appeared, had been taken out by leave of

WATERS U. HANDLEY. WATERS b. HANDLEY. the Court, the defendant not being resident within the jurisdiction of the Court at the time of the action being brought. The affidavit supporting the application, stated that the defendant "at the time of the entry of the plaint, did not reside in the Clerkenwell district, nor had he resided there within the previous six months." Fourthly, the summons on which the proceeding had taken place did not state on the face of it that it had been issued "by leave of the Court." This was requisite in order to shew on the face of the process that the Court had jurisdiction. defendant was resident out of the jurisdiction of the County Court, and therefore, he was not primâ facie liable to be sued before that tribunal. Unless, therefore, the process when served on the defendant disclosed the fact of its having issued by leave of the Court, he could not know whether it was incumbent on him to appear to it.

COLTMAN, J. (a).—With respect to the form of the writ of summons, it appears to me to be sufficient, as it is in the form which the Judges prescribed by the rules of Court which they made under the statute. The only point which can properly be a matter of discussion, is that with reference to the residence of the defendant, as he swears that he was not resident at any time during the six months previous to the action being brought. Upon this point, therefore, a rule nisi may be granted, but not upon the other objections.

MAULE, J., and WILLIAMS, J., concurred.

Rule accordingly.

(a) Wilde, C. J., was absent.

1848.

Manwell v. Thompson and Others.

PHIPSON applied for leave to issue an attachment Where there against the plaintiff in this cause, on the ground of the non defendants in affidavit supporting the application, and which denied the attach the payment of the costs was not affidavit supporting the application. The question was, whether the affidavit in the cause. was sufficient.

of costs, the affidavit denying the payment must be made by all the defendants

PER CURIAM.—For anything that appears on the face of this affidavit, the plaintiff may have paid the costs to one of the defendants. It is insufficient, unless all the defendants joined in making it.

Rule refused.

LESLIE v. RICHARDSON.

BYLES, Serjt., and Phinn, shewed cause against an ap- An arbitrator, plication made by *Petersdorff*, for a rule to enlarge the time the usual power for an arbitrator to make his award until the first day of Michaelmas Term next. An order of reference had been made in the usual form, with power to the arbitrator to enlarge the time for making his award. On several occasions, the arbitrator had enlarged the time for making his award, but had accidentally omitted to extend the period of the last enlargement. The question was, whether the Court had power, under the 3 & 4 Wm. 4, c. 42, s. 39, to extend the period limited for making the award after it had been allowed to expire, in consequence of the arbitrator's omis-It was submitted that the Court had no such power.

who had, under conferred by an order of reference. on several occasions enlarged the time for making his award, permitted the period of the last enlargement to pass without a further enlargement; the Court held that it had power under the 3 & 4 Wm. 4, c. 42, s. 39,

still further to enlarge the time for the arbitrator to make his award.

LESLIE v. RICHARDSON.

By the 3 & 4 Wm. 4, c. 42, s. 39, it was provided, "that the power and authority of any arbitrator or umpire appointed by or in pursuance of any rule of Court, or Judge's order, or order of nisi prius, in any action now brought or which shall be hereafter brought, or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of any of his Majesty's Courts of record, shall not be revocable by any party to such reference, without the leave of the Court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a Judge; and the arbitrator or umpire shall and may, and is hereby required to proceed with the reference, notwithstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference; and that the Court or any Judge thereof may, from time to time, enlarge the term for any such arbitrator making his award." Where the arbitrator had no power reserved to him to enlarge the time for making his award, it was reasonable to suppose, that the Legislature intended the Court to have power to enlarge the time for making the award; but where such a power was conferred upon the arbitrator, then that power should be exercised In Doe d. Jones v. Powell (a), Patteson, J., observed, in speaking of the statute, "that means rather that the Court may enlarge the time where no power is given to the arbitrator to do so; if there is such a power, it is for him to do it: but I doubt if the Court could do it in a case where the parties, or the arbitrator, will not consent to proceed with the reference." [Cresswell, J., referred to Parbury v. Newman (b), where it was held that the Court has power, under 3 & 4 Wm. 4, c. 42, s. 39, to enlarge the time for an arbitrator to make his award, where the arbitrator having power to enlarge has allowed

⁽a) 7 Dowl. 539, 40.

⁽b) 9 Dowl. 288; S. C. nom. div. 7 M. & W. 378.

the time limited by the submission to elapse without doing so]. But in Lambert v. Hutchinson (a), Tindal, C. J., when the case of Parbury v. Newman was cited in the course of the argument, observed, "I doubt whether the statute empowers the Court, or a Judge, to interfere where the arbitrator has power to enlarge, but he has inadvertently permitted the time to expire, without exercising his power." In that case, the Court declined to interfere in the manner proposed by the present application.

LESLIE

BICHARDSON.

Petersdorff, in support of the motion. No doubt the object which the Legislature had in view when the statute in question passed was to prevent a failure of justice. the interpretation for which the other side contended would restrict the operation of the statute to very few cases indeed. It never could have been intended that the Court should have been permitted to interfere only in those cases where the time originally limited had expired, and no enlargement had taken place. If, then, it could not be successfully contended that such a restricted meaning should be put on the words of the statute, there could be no reason for holding that the Court could not interfere in the way here proposed. The case of Parbury v. Newman was a direct authority in support of this view, and the dictum of the Chief Justice Tindal in Lambert v. Hutchinson could not be considered as intended to overrule an express decision of the full Court of Exchequer. The reason of the Court of Common Pleas not interfering in the way proposed in Lambert v. Hutchinson was, that from the lapse of time which had taken place there, before the application was made, it was not considered a proper case for the interference of the Court. If after the time, for which the arbitrator had enlarged the period for making his award, had expired, the parties chose to meet before him, they could, by consent, extend the period for making his award.

(a) 2 M. & G. 858; S. C. 3 Scott, N. R. 221.

1848.

Leslie

v.

Richardson.

If they could do so, the Court must have, under the statute, an equal power.

Cur. adv. vult.

COLTMAN, J., now (a) delivered the judgment of the Court (b).—This was an application to the Court, under the statute 3 & 4 Wm. 4, c. 42, s. 39, for a rule to shew cause why the time for making an award should not be further enlarged until the first day of Michaelmas Term next. Cause was shewn in the first instance, and it appeared that this and another cause had been referred to an arbitrator, with power to him from time to time to enlarge the time for making his award. The arbitrator had several times enlarged the time for making his award, but had at last inadvertently omitted to make a further enlargement, in consequence of which it became necessary to apply to the Court to enlarge the time. On shewing cause, it was contended that the Court had no power, under the statute, to make such an enlargement. questions have at different times been raised as to the construction of that part of the section which gives power to the Court to enlarge the time for making an award, viz., first, whether the power to enlarge is confined to cases where there has been an attempt to revoke the authority of the arbitrator; secondly, whether it is confined to cases in which the arbitrator has no power to enlarge; thirdly, whether the Court can enlarge after the expiration of the original or enlarged time, as the Court of Exchequer in Parbury v. Newman (c), held they might. With respect to the first two questions, the power conferred by the act is, "to enlarge the term for any such arbitrator making his award." The only description of arbitrator which precedes this word of reference "such," is that at the beginning of the section; that is, "any arbitrator" "appointed by" "rule of

⁽a) In Trinity Vacation. Williams, J.

⁽b) Wilde, C. J., Maule, J., and (c) 7 M. & W. 378.

Court, or Judge's order, or order of nisi prius." This description of arbitrator, construed according to the strict and natural sense of the word, comprehends all arbitrators appointed by rule of Court, &c.; and, with reference to the first and second questions above mentioned, it is to be observed that there are no words to restrict the power of the Court in the way suggested; in order so to restrict it, some such words as, "in case of such revocation," or "when the arbitrator has no power to enlarge," would be To construe the clause in an unrestricted sense, seems to be most consistent with the natural construction of the words of the enactment; and, as an omission to make an award within the time limited, may and often does occur, and when it occurs, often produces inconveniences, in other cases besides those in which the arbitrator has no power to enlarge, or those in which an attempt to revoke has been made; there is no reason for adopting a construction of the words restrictive of their natural and proper meaning. With regard to the power to enlarge after the expiration of an original or enlarged time, the power given to the Court is, "from time to time," "to enlarge the term," &c. If these words occurred, as they often do, in a submission to arbitration, in which power is usually given "to the said arbitrator from time to time to enlarge the term" for making the award, there seems no doubt that they would not authorize an enlargement made after the time had expired. But, it is to be observed, that, in the case of a power given by the submission it is given to the arbitrator in his character of arbitrator, which character is not absolute and perpetual, but conditional and limited, "if he shall make his award on or before," &c.; whereas, the power given by the act of 3 & 4 Wm. 4, c. 42, is conferred on the Court which has perpetual existence and is given absolutely and not conditionally. It appears, therefore, to us, that the power may be so construed as to comprehend the case of an enlargement after the expiration of the time limited; and as the mischief to be remedied would (as was pointed out in the case of

LESLIE v.
RICHARDSON.

1848. LESLIE RICHARDSON.

A declaration in debt set out

a bond for the payment of a

certain sum of

money to the plaintiffs or E.

upon request, whereby and

by reason of

the non payment thereof.

an action accrued, &c.

The defendants craved

oyer, and set out the bond

correctly, and

the condition. without dis-

tinguishing them from the bond. They

then craved oyer of the

condition, and

set it out without the recitals

and concluded

then stated the recitals in

Parhury v. Newman (a)) be very inadequately remedied on a narrower construction, we concur with that Court in thinking that the larger construction ought to be adopted.

The result is, that in this case, there should be a rule absolute for enlarging the time as prayed.

Rule accordingly.

(a) 7 M. & W. 378.

KEPP and Another v. WIGGETT and Others.

DEBT. The declaration stated that the defendants and one James Lee, who died before the commencement of the suit, theretofore, to wit, &c., by their certain writing obligatory, &c., acknowledged themselves to be jointly and severally held and firmly bound unto the plaintiffs in the sum of 8000L of, &c., to be paid to the said plaintiffs or to one William Everett, Esq., on request; whereby, and by reason of the non payment thereof, an action hath accrued, &c.

The defendants, by their plea, craved over of the said writing obligatory in the said declaration mentioned, and it is read to them in these words: "Know all men by these presents, that we, James Lee, of No. 50, Drury Lane, in the parish of St. Martin in the Fields, in the county of Middlesex, collector; James Wiggett, of No. Lane, in the parish of St. Giles in the Fields, and county aforesaid, gentleman; George Robinson, of No. Wigmore Street, in the parish of St. Marylebone, in the said county, auctioneer; which said James Lee is a collector for the wards of New Street, Bedfordbury, Drury

by pleading performance generally by the defendants only. The plaintiffs prayed that the bond and condition might be enrolled; they were then set out correctly, and it appeared that the condition was, that the defendants and L. should pay over sums of money assessed and collected by L., and that L. should demand the sums assessed, and proceed against defaulters. The plaintiffs demurred: Held, first, that it was not necessary to state a request to the defendants in the declaration; secondly, that the averment "by reason of the non payment, &c.," did, after plea sufficiently deny payment to the plaintiffs or E.; thirdly, that the plea was bad for not averring performance by Lee; and, fourthly, that it was bad as merely alleging general performance, instead of setting forth in what way the condition had been performed.

Samble, that if a defendant incorrectly sets out on over a bond and condition, the proper mode of taking advantage of the defect is by a motion to set saids the pleading.

of taking advantage of the defect is by a motion to set aside the pleading.

Lane, and Long Acre, in the parish of St. Martin in the Fields, in the division of the city and liberty of Westminster, in the county of Middlesex, duly nominated and appointed by the commissioners acting for the said parish of St. Martin in the Fields, in the execution of an act of Parliament passed in the sixth year of the reign of her present Majesty, intituled, 'An Act for granting to her Majesty duties on profits arising from Property, Professions, Trades and Offices, until the 6th day of April, 1845,' and of the several other acts therein referred to; and of another act passed in the eighth year of the reign of her said Majesty, intituled, 'An Act to continue for three years the duties on profits arising from Property, Professions, Trades and Offices,' and which said James Wiggett, Richard Robinson, and George Robinson, as sureties for the said James Lee, are jointly and severally held and firmly bound unto Richard Kepp, Esq., and Charles Lewis, Esq., being two of the said commissioners acting in the execution of the said acts for the said parish of St. Martin in the Fields, in the said county of Middlesex, in the sum of 8000L of lawful money of Great Britain, to be paid to the said Richard Kepp, Esq., and Charles Lewis, Esq., or to William Everett, Esq., their executors or administrators, for which payment to be well and truly made we bind ourselves, and each of us bindeth himself, for the whole and entire sum, our and each of our heirs, executors and administrators, firmly by these presents, sealed with our seals, dated this 6th day of October, in the tenth year of the reign of our Sovereign Lady Victoria, &c., A. D. 1846." And whereas the above bounden James Lee hath been duly nominated and appointed a collector for the year ending the 5th day of April, 1847, of the several duties granted by the said recited acts which have been or hereafter shall be assessed within the said wards and parish of St. Martin in the Fields, for the said last-mentioned year, under and by virtue of the said acts; and the said James Lee, together with the said James Wiggett, Richard Robinson, and George Robinson, as his D. & L. YOL. VI.

KEPP and Another v. Wiggerr and Others. KEPP and Another Wiggert and Others.

sureties, have entered into and executed the above written obligation to give good and sufficient security for the faithful discharge and due performance by the said James Lee, of his said office of collector as aforesaid; and whereas duplicates of the assessments have been delivered and given in charge to the said James Lee, with a warrant or warrants for collecting the same. They also crave over of the condition of the said writing obligatory, and it is read to them in these words: "Now, the condition of the above written obligation is such, that if the above bounden James Lee, James Wiggett, Richard Robinson, and George Robinson, or either of them, their or either of their heirs, executors or administrators, shall and do duly, in pursuance of the directions of the said acts, pay all such sums of money which now are assessed and collected for the year ending the 5th of April, 1847, or which hereafter may be assessed and to be collected in the said ward and parish of St. Martin in the Fields, by the said James Lee, as such collector as aforesaid; and if the said James Lee shall and do duly in pursuance of the said act, demand the sums assessed of the respective persons from whom the same are payable, and in case of non payment thereof, shall duly enforce the power of the act against such as shall make default, then the above written obligation to be void, otherwise the same shall be and remain in full force and virtue." Which being read and heard, the said defendants say that they, the said defendants, did from time to time, and at all times after the making of the said writing obligatory, and the said condition thereof, well and truly observe, perform, fulfil and keep, all and singular the articles, clauses, payments, conditions and agreements in the said condition of the said writing obligatory, specified, comprised, and mentioned, in all things therein contained on their part and behalf, to be observed, performed, fulfilled, and kept, according to the tenor and effect, true intent and meaning of the said condition of the said writing obligatory. Verification.

1848.

The plaintiffs, as to the plea of the defendants, replied that the defendants had not truly set out the said writing obligatory, and the condition thereto, and prayed that they might be enrolled; which being done, and the bond and condition set out, it appeared that the part of the plea between the end of the bond and the demand of over of the condition of the bond, was the recital in the condition. The plaintiffs demurred, on the grounds that the plea set out the recitals to the condition as if they were part of the writing obligatory itself, and that it is uncertain whether the defendants intend to allege that those recitals form part of the deed or part of the condition, or that they do not form part of either, but are mere averments; and also that the general mode of pleading performance is insufficient, and that the plea should have shewn that the defendants and Lee, or some or one, and which of them, did pay all sums assessed and collected for the year ending the 5th of April, 1847, and did duly demand the sums assessed, and did duly enforce the powers of the act against defaulters.

KEPP and Another and Others. of the control of the

Needham, (Channell, Serjt., with him), in support of the demurrer. The first ground of demurrer was, that the defendants had incorrectly recited the deed and condition in their plea. This was a good objection on special demurrer. In Com. Dig. tit. "Plead." (P1) it was laid down, "so if the defendant demands over of a deed which is granted, and in his plea recites the deed different from the true deed, the plaintiff, by his replication, may pray that the deed may be enrolled, and so procure it to be truly enrolled." For this no authority was cited. It was, however, recognised in 1 Wms. Saund. 9 c, n. (2), 6th ed.; Ferguson v. Mackreth (a). [Maule, J.—Is not the proper course pointed out in that case, namely, that a summary application should be made to the Court for the purpose of setting aside the pleading? The difference between the

KEPP and Another v. WIGGETT and Others.

deed as set out on oyer, and the deed itself, cannot be a ground of demurrer. The question is, whether it is a matter of practice or pleading. I think, from the course adopted in Ferguson v. Mackreth (a), that it is a matter of practice. Cresswell, J.—In Smith v. Yeomans (b), the marginal note is, "a deed shewn in the adversary's plea, being set out upon oyer, becomes part of the plea, and if it thereby appears that the plea is false, it is a good cause of demurrer."] Though it might be the subject of a summary application as a matter of practice, the plaintiffs would still have a right to demur.

Ogle, contrà, referred to Paine and Another v. Emery (c), where a declaration in covenant set out the deed according to its legal effect, and the defendant on over set it out in heec verba, the Court held that the defendant could not demur to the declaration on the mere ground of variance, because the deed, as set out on over, became part of the declaration.

The Court intimated to Needham that if he thought proper, he was at liberty to withdraw his demurrer.

Needham contended that there were other substantial grounds of demurrer to the plea, which he proceeded to argue. The condition of the bond was, that Lee should perform certain acts. Here, however, no allegation of performance of those acts by Lee was made. The principal act was to be done by him, not by the defendants, and the plea does not allege that he performed that act. Again, the plea was bad, as being a plea of general performance, without stating the mode in which the condition had been performed; Com. Dig. tit. "Pleader," (E 25); (2 W. 33); 1 Lev. 303; 1 Sid. 215. The case of Roakes v. Manser (d), was to the same effect; and Coltman, J., there intimated that such a plea would be bad on general demurrer.

```
(a) 4 T. R. 371, n. (b). M. & R. 304.
```

⁽b) 1 Saund. 316, a. (d) Ante, vol. 3, p. 17; S. C.

⁽c) 4 Dowl. 191; S. C. 2 C., 1 C. B. 531.

Ogle, contrà. The general allegation of performance must be considered in the present case sufficient, and must be intended to embrace not merely the performance of the condition by the defendants, but by Lee also. could be required that each particular payment made, or act done, which would come within the scope of Lee's duty, ought to be set out. But the declaration was itself defective. First, the breach alleged did not agree with the condition. The condition was to pay the plaintiffs or Everett; but the breach alleged was the non payment of the money to the plaintiffs. It was consistent with this, therefore, that the defendants had paid Everett. In order to render the breach conformable with the condition, it was necessary to be alleged that the defendants had not paid either the plaintiffs or Everett. Where a contract was to do one of two things in the alternative, it ought to be shewn that the party charged with a breach of contract had not done either of those things. Thus in Wright v. Johnson (a), where the declaration stated a contract between the plaintiff and the defendant concerning the loan of two horses, and the defendant agreed that if the plaintiff would lend them to him he would pay 3s. 6d. a-day, and if the animals were not returned by a certain day, in the same plight as at the time of the loan, the defendant should pay 10% damages for each horse so injured. The breach assigned was, that one of the horses was detained a certain number of days beyond the stipulated time, and that the other was not returned at all. After verdict for the plaintiff on non assumpsit, the Court held that that was error; the promise was to return the horses at a certain day, or pay a certain sum; but the breach was, that one was not returned for a certain number of days after the stipulated time, and that the other was not returned So in Gibbons v. Northcott (b), the Court held, that if a man promises to keep another harmless, or pay him the sum of 1000% in the disjunctive, it ought to be alleged in

KEPP and Another v. Wiggett and Others.

KEPP and Another WIGGETT and Others.

the declaration that he had done neither; Com. Dig. tit. Again, no allegation was introduced " Pleader," (C 44). into the declaration that any request to pay had been made The allegation in the declaration was, to the defendants. that the defendants had bound themselves to pay the sum in question "on request;" it was, therefore, essential to the maintenance of the action, and, consequently, to the goodness of the declaration, that a request should be alleged. If issue had been taken on the fact of request, the plaintiffs would have been bound to prove an express request made; Carter v. Ring (a). In Nicholl v. Bromley (b) it was held, that if the defeasance of a warrant of attorney states that it is given to secure the payment of a sum on demand, and, in case default shall be made, that then judgment shall be entered up and execution issue, an actual demand must be made.

Needham replied.

WILDE, C. J.—I am of opinion that the declaration is free from any of the objections which have been urged against it. It is in the common approved form, stating that the bond was given to pay on request. A request in such a case has never been considered as a condition precedent to the plaintiff's right of action, and, therefore, it need not be alleged that any such request was made. Then with respect to the plea. The condition consists of two parts. One is, that these three persons, who are obligors, shall pay over to the plaintiffs, or to Everett, what is received; and, secondly, that Lee shall perform certain duties connected with a public trust. The performance by any one else would not perform that obligation. A performance by the sureties would not be a performance by Lee within the meaning of the bond. The sureties, however, content themselves by alleging their own performance of their

⁽a) 3 Campb. 459.

⁽b) 2 B. & B. 464; S. C. 5 Moore, 307.

dutica, and leave untouched the duty imposed on Lee. Then it is said that it is not necessary for the defendants to set forth in their plea the particular mode in which the various duties imposed upon them, or upon Lee, had been performed. The defendants are not required to set out every receipt and every sum of money paid over, but it would be sufficient to allege that Lee had paid over all the sums which came to his hands. It would then have been competent for the plaintiffs to allege that there were certain sums which he had not paid over. That was the form adopted in the case of Gwynne v. Burnell and Another (a). Here, however, there is no averment at all of performance by Lee of his duties. The declaration, therefore, I am of opinion, is good, and that the plea affords no answer to the action.

KEPP and Another w. Wiggett and Others.

COLTMAN, J.—It is not necessary to decide in this case whether it is a good ground of demurrer that there has been an untrue statement of the bond and condition by the defendants when they set them forth on oyer, though I am rather inclined to think that the effect of the enrolment is to remove the difficulty. I think that the plea is bad in substance, and that in such a declaration it is not necessary to aver a request.

MAULE, J.—I think the plaintiffs are entitled to judgment. The defendants have set out something as part of the bond which is not so. The cases shew that that may be corrected by enrolment, so that the Court may see that the matter so set out on enrolment is the true statement of the matter of the action. It is not necessary to enter into an inquiry as to what is the precise remedy in such a case, but there is a remedy of some sort in practice. Then as to the questions which have been raised on the pleadings. It is said that the declaration is bad, because the money was to be paid to the plaintiffs or to one Everett, and that the

(a) 6 Bing. N. C. 453; S. C. 1 Scott. N. R. 711.

KEPP and Another v. Wiggerr and Others.

non payment to either ought to be alleged. But the non payment here stated must, after pleading over, be taken as a non payment to every one. That is an answer to the Then as to the argument that it was necessary for the plaintiffs to allege a request in the declaration. appears that this is in the old and common form of declaration, in which it is stated that the money was to be paid on request, but a request is never shewn to have been made. No doubt there are many cases in which the parties have made a request to pay a condition precedent, but this is not one of those cases. Then with regard to the plea, it seems to me that it is bad in substance, for not shewing that everything was done which the defendants were bound to see performed. They were bound to state what was done, though in a general form of allegation, but not a general performance, which is only an argumentative way of alleging that all had been done which they were bound Then comes the substantial objection that the defendants do not allege the performance of the condition so far as it concerns Lee. The condition requires that the defendants should see that Lee demanded payment, and proceeded against defaulters. Those were things which the defendants could not do. They must, therefore, shew that that which was to be done by Lee was done by him, as well as that what was to be done by them was done. There is no allegation that Lee had brought suits which he alone could bring. It appears to me, therefore, that the plea is bad in substance as well as in form.

CRESSWELL, J.—I am of the same opinion. The declaration, it appears to me, is free from any objection which can be taken now. With respect to the mode adopted here of alleging performance generally, that leaves it quite uncertain what act the defendants mean to say is a performance, so that the Court is not enabled to judge whether it is such a performance as the condition of the bond required.

Judgment for the Plaintiffs.

1848.

EDWARDS and Others v. LAWLESS.

HUMFREY and Phipson shewed cause against a rule In an action obtained by Whitehurst to enter a nonsuit. It was an ney's bill action of debt to recover the amount of an attorney's bill against a member of a of costs, incurred by a railway company, which was called managing "The Great Manchester, Rugby, and Southampton Rail- a railway comway Company, with a direct line from Derby to Rugby." pany, a de-livery of a The defendant pleaded amongst other pleas, that no signed signed bill to another membill in conformity with the 6 & 7 Vict. c. 73, s. 37, had ber of the been delivered. It appeared, the defendant was charged committee at as one of the members of the managing committee. the trial before Rolfe, B., at the Leicester Summer Assizes cient delivery for 1847, it was proved that Messrs. Thompson and 6 & 7 Vict. Debenham were appointed in August, 1845, as solicitors to the company. Subsequently, in the month of September, the plaintiffs were appointed at a meeting of the managing committee, as solicitors, to take the management of the northern part of the line, the duties of Messrs. Thompson and Debenham being confined to the southern The defendant became a member of the managing committee in the month of August, 1845. Proof was given that he had in company with a person named Prole, another member of the managing committee, applied to several persons at Derby and the neighbourhood, who were landed proprietors, to induce them to become members of the managing committee. No evidence, however, was given to shew that the defendant had attended any meeting or taken any active part in the management of the company before the 11th of October or after the 30th of the same month. It also appeared that a letter had been written on the 12th of November, 1845, by the defendant, in which he on the ground of ill health, withdrew from any connection with the company. Among the members of the managing committee, was a person named Moore, who

his residence, At is not a suffic. 73, s. 37.

EDWARDS and Others

LAWLESS.

carried on business in Milk Street, Cheapside. become a member of the managing committee before the defendant joined. To that person, at his place of business, on the 26th of May, 1846, the plaintiffs delivered their bill of costs, amounting altogether to 1474l. 4s. 4d. It was headed "The Provisional Committee of the Great Manchester, Rugby, and Southampton Railway Company, with a direct line from Derby to Rugby, To Edwards, Mason, and Edwards." In it, were a variety of charges for business done on account of the company, from September 1st, 1845, down to April 15th, 1846. The office of the railway company was No. 1, Royal Exchange Buildings. close of the plaintiffs' case, several objections were taken on the part of the defendant, to the plaintiffs' right to recover, and among them, that the bill on which the action was founded had not been delivered in conformity with the provisions of the statute 6 & 7 Vict. c. 73, s. 37. words of the statute were "that no attorney or solicitor" "shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements, for any business done by such attorney or solicitor, until the expiration of one month after such attorney or solicitor" "shall have delivered unto the party to be charged therewith, or sent by the post to or left for him at his counting-house, office of business, dwelling-house, or last known place of abode, a bill of such fees, charges, and disbursements." The question was, whether the delivery to Moore was a sufficient delivery to charge the present defendant. It was submitted, that the delivery was sufficient. Moore and the defendant were joint contractors, and the delivery to one therefore, was a delivery to both. This was held in the case of Crowder v. Shee (a). There it was decided that where several persons are jointly liable to an attorney for business done, the delivery of a copy of the bill to one of them is sufficient to maintain a separate action against any

of the others. In Vincent v. Slaymaker (a), Bayley, J., observed, "the act does not say that the delivery shall be to the client in person, but leaves that at large according to what shall be deemed a delivery to the party in point of law; and then by the general rule of law, a delivery to an agent authorized to receive it is a delivery to the party himself." Here Moore must be considered, in point of law, as the agent of the defendant, and therefore, a delivery to him was a delivery to the defendant within the meaning of the statute. The fact of the bill containing items for which the defendant was not liable, did not vitiate the delivery, as those items might be struck off on taxation.

EDWARDS and Others

LAWLESS.

Whitehurst and D. D. Keene supported the rule. The delivery of the bill in the present case was insufficient. The plaintiffs sought to charge the defendant, as a member of the managing committee of the company, for which the business had been done, and the bill was made out to the committee of that company, the delivery, therefore, should have been at the offices of the company itself or at the residence of some person who properly represented the company, if a delivery to any other person than the defendant himself was to be considered as sufficient. Here, the delivery being to Moore at his private place of business, could not in any way be considered as a delivery to the company itself or to any person representing the company. If it should be held that such a delivery was sufficient, a door to collusion to a most mischievous extent would be opened. A bill might then be delivered to a person, who purposely abstained from giving it to the party sought to be charged therewith, and thus he would be deprived of his opportunity to have the bill taxed. [They were then stopped by the Court (b).

Court was confined to the question whether the delivery of the bill was sufficient.

⁽a) 12 East, 372, 9.

⁽b) The arguments on the other points in the case are not stated, as the judgment of the

EDWARDS and Others

WILDE, C. J.—All the members of the Court are agreed on the question as to the delivery of the bill. And we are of opinion that there has been no sufficient delivery of the bill under the statute. We cannot consider this case as falling within the general rule which applies to co-contractors, as regard must be had to the peculiar nature of the concern in which the defendant and Moore were en-At the trial, it appeared, that the members of the committee joined at different times. Thus, Moore had come in earlier than the defendant, who did not join the committee until the month of October. On looking at the bill, it appears that it contains the contractors' charge for business done between the 1st of September, 1845, and the 15th of April, 1846; for many of the items contained in that bill the defendant is clearly not liable, although Moore may be liable. The latter can in no way be considered as standing in such a relation to the defendant as to render a delivery to him a delivery to the defendant. Then can it be considered as a delivery to the committee? The place of business belonging to the committee was known, yet no delivery was made there, but at the private place of business The delivery, therefore, was not a delivery to the committee, and so could not be sufficient to bind the defendant as a member of that committee. Without considering at present how far a delivery to one co-contractor may be a delivery to all, we think that the delivery to Moore was not such as he was authorized to receive, so as to charge all the other members, who might be liable for any portion of the bill. The delivery ought to have been either at the place of business or office of the company, or, at least, to some person who might fairly be considered as representing the committee for that purpose. I am of opinion, therefore, that the rule for a nonsuit must be made absolute.

COLTMAN, J.—I am of the same opinion. Committee men in joint stock companies stand in a very different

situation from the members of ordinary copartnerships. The same rules, therefore, which may apply to ordinary copartnerships, are not applicable to those persons who stand in the relation of committee men. The position of the latter is sui generis. I think, therefore, that the delivery of the bill of costs to Moore, was not a delivery to the defendant within the meaning of the statute, and consequently, that the present rule for entering the nonsuit ought to be made absolute.

1848. EDWARDS and Others LAWLESS.

WILLIAMS, J., concurred (a).

Rule absolute.

(a) Cresswell, J., had left the Court at the conclusion of the argument.

CORDEN v. UNIVERSAL GAS LIGHT COMPANY.

"ALFOURD, Serjt., shewed cause against a rule obtained Where a by Phipson, calling upon Dominique Causse to shew cause been given why execution should not issue against him as a former of a plaintiff shareholder in the Universal Gas Light Company, upon a of his intention judgment signed against that company. The application under the was founded on the 7 & 8 Vict. c. 110, s. 68. By that 7 & 8 Vict. c. 110, s. 68. section, it was provided that execution might issue in such to obtain exea case by leave of the Court, or of a Judge of the Court a former in which the judgment was obtained, upon motion or on a judgment summons. By a proviso at the end of the section, how-obtained against a ever, it was enacted, "that no such motion shall be made, public comnor summons granted, for the purpose of charging any matter has shareholder or former shareholder, until ten days notice before a Judge thereof shall have been given to the person sought to be at Chambers charged thereby." A notice was accordingly given, on an application to the Court

cution against shareholder pany, and the been heard and dismissed. cannot be

founded on that notice, as by the hearing before the Judge it has been exhausted.

CORDEN

Universal
Gas Light
Company.

the part of the plaintiff, to Dominique Causse, in the following form:—

"In the Common Pleas.

Between

ROBERT CORDEN, Plaintiff,

and

THE UNIVERSAL GAS LIGHT COMPANY, Defendants.

"Whereas a judgment was obtained on the 3rd day of February instant, in her Majesty's Court of Common Pleas, for the sum of 110L damages, and 105L 19s. 2d. costs, in a certain action brought by the above-named plaintiff against the above-named defendants, being a company completely registered under an act made and passed in the 7th and 8th year of the reign of her present Majesty, intituled 'An Act for the Registration, Incorporation, and Regulation of Joint Stock Companies;' and whereas the said plaintiff hath used due diligence to obtain satisfaction of the said judgment against the property and effects of the said company, but there is not any property, nor are there any effects of the said company out of which the said judgment, or any part thereof, can be satisfied. And whereas you, Edmund Boulter, James Shayler, Joseph Field, Dominique Causse, Joseph Peplow, Edward Suter, Henry Alt, and Anthony Kent, some or one of you were respectively shareholders or a shareholder in the said company at the time when the contract or engagement with the abovenamed plaintiff, for which the said judgment was obtained, was entered into, or became shareholders or a shareholder during the time the said contract or engagement remained unexecuted or unsatisfied, or were respectively shareholders or a shareholder at the time the said judgment was obtained. Now we do hereby give you notice, that upon the expiration of ten days from the date of the service of this notice upon you, some or one of you, or as soon after the expiration thereof as conveniently may be, a motion will be made in her Majesty's Court of Common Pleas, or an application to one of the Judges thereof, for a rule or summons, calling

upon you, some or one of you, to shew cause why execution should not issue against you, some or one of you, upon the same judgment, until the same shall be satisfied. Dated this 8th day of February, 1848.

To (the parties above-named).

(Signed) G. & H., attorneys for the abovenamed plaintiff."

On this notice, the parties appeared before Parke, B., on a summons; and he being of opinion that the application could not be sustained, dismissed the summons. present application was then made to the Court for a rule, not by way of appeal from the learned Baron's decision, but as an original application. No fresh notice had been given besides the one on which the hearing on the summons had taken place. It was submitted that the plaintiff, in order to succeed, ought to have given a fresh notice, as the one already given had been exhausted by the hearing at Chambers. Besides, the present notice was far too vague and uncertain to enable the defendant to know in what character he was sued with reference to the contract on which the plaintiff had obtained his judgment against the company. It was also uncertain as to the person against whom he proposed to proceed, and also as to the place where the application was to be made.

Phipson, in support of the rule, contended that the proceedings before Mr. Baron Parke must be considered as coram non judice, because the application was to be made to the Court or to a Judge of the Court in which the judgment was obtained. Parke, B., however, was not a Judge of the Court in which the judgment was obtained, that Court being the Court of Common Pleas. The notice, therefore, was perfectly available to support the present motion. Then, with respect to the form of the notice, it ought not to be construed with minute strictness, as the sole object of it was to inform the defendant of the plaintiff's

CORDEN

UNIVERSAL
GAS LIGHT
COMPANY.

CORDEN

CORDEN

UNIVERSAL
GAS LIGHT
COMPANY.

intention to proceed upon the judgment against him. In what relation he stood to the contract on which the plaintiff sued was a matter peculiarly within his own knowledge, and which, therefore, need not be particularly disclosed.

WILDE, C. J.—The Legislature has thought fit to provide that any shareholder sought to be charged on a judgment obtained against the company, should have ten days' notice of the motion in Court, or of the summons at This is not an application by way of appeal from the decision of the Judge at Chambers. The plaintiff gives notice of his intention to do one of two things, and the defendant would reasonably expect that if one of those two things was done, namely, the application at Chambers, the notice would be satisfied. The parties go before a Judge at Chambers, and the summons is dismissed, and are not informed for what cause. This then must be taken to be an original application to the Court, and, therefore, that the plaintiff has failed to comply with the proviso in the statute which requires ten days' notice to be given of his intention, as the only notice shewn to exist has been exhausted.

COLTMAN, J.—I express no opinion as to whether a fresh notice may or may not be given, or upon the other objections which have been taken to the form of the notice, but I am of opinion that the notice shewn to have been given, having been acted upon, is exhausted, and, therefore, that no notice has been given as required by the statute previous to the present application. The present rule ought, therefore, to be discharged.

MAULE, J., and CRESSWELL, J., concurred.

Rule discharged.

1848.

PLACE v. CAMPBELL.

HANCE shewed cause against a rule nisi obtained by The Court Hawkins, to rescind an order made by Erle, J., for staying Judge's order proceedings in this action until security for costs had been given, it being sworn that the plaintiff was abroad. security was given, and the proceedings of the plaintiff were stayed. The present rule was obtained on an affidavit of the plaintiff, in which he swore that he had costs were returned from abroad, and had no intention to leave the jurisdiction. On the part of the defendant, however, it given), it being was sworn that the plaintiff was in the situation of a butler sworn that the in a gentleman's family, and was therefore liable at any returned to England, and moment to be required to leave the country. The case, had no intenhowever, of Badnall v. Haley (a), was an authority to shew that the facts stated in the plaintiff's affidavit were not sufficient to entitle him to have the present rule made absolute. There, the plaintiff had been compelled to give security for costs, on the ground of his residing out of the jurisdiction, but the Court refused to direct the bond to be delivered up to be cancelled during the pendency of the suit, although it was sworn that the plaintiff had returned to England, and intended to remain permanently there. The case of Thrasher v. Bush (b) was an authority to the same effect. The case had already been three times before Coleridge, J., for the purpose of obtaining the rescision of the order, but that learned Judge had refused to interfere.

Hawkins, in support of the rule, contended that the cases cited were different in their circumstances from the present. There, security had been given for the costs. Here it had not. There, costs had been incurred since the security had been given. Here, none whatever had been

staying proceedings in an No action, on the ground of the plaintiff being abroad, until security for given (no such security having been tion of going abroad again.

⁽a) 7 Dowl. 19; S. C. 4 M. & W. 535.

⁽b) 2 Dowl. 51, N. S.

PLACE

U.

CAMPRELL.

incurred since the order for staying proceedings was obtained. The suggestion contained in the defendant's affidavit as to the situation of the plaintiff, could not counterbalance the positive statement on oath of the plaintiff himself, that he had no intention to leave the country. He, therefore, stood in the same situation as any other person bringing an action in this country.

PER CURIAM.—We think that the case of Badnall v. Haley (a) is distinguishable from the present. In that case, security had been given for costs, but here only an order requiring the plaintiff to give such security has been made, and no security given. The affidavit of the plaintiff states that he has returned from abroad, and does not intend again to quit England. That we are of opinion is sufficient. The present rule, consequently, must be made absolute.

Rule absolute.

(a) 7 Dowl. 19; S. C. 4 M. & W. 535.

DARRINGTON v. PRICE.

On the 22nd of February, the time for pleading expired; on the 23rd, a summons for time to plead was taken out; on the 24th, an order for time ou the usual terms was made; the defendant

PRENTICE shewed cause against a rule nisi obtained by Hawkins to rescind an order of Coltman, J., and to set aside all proceedings subsequent to the delivery of the plea. The facts, as to which there was no dispute, were these. The plaintiff filed his declaration on the 14th of February, 1848, and gave notice of declaration on the same day to the defendant. The venue was laid in the county of Essex. The time for pleading expired on the 22nd of February.

did not draw it up, but on the same day served a rule to change the venue, and delivered a plea. On the 25th, the issue was delivered, with notice of trial in the original county. On the 26th, a summons to set aside the issue and notice of trial was served. On the 28th, an order rescinding the rule to change the venue, and directing the notice of trial to stand was made by a Judge at Chambers. At the ensuing assizes, the defendant did not appear, and the cause was taken as undefended: Held first, that a Judge at Chambers has power to rescind a rule of Court changing the venue; and, secondly, that under the circumstances, such order ought not to have been made.

DARRINGTON 9. PRICE.

On the 23rd of February the defendant took out a summons for time to plead, and on the 24th an order was made for further time on the usual terms. That order, however, was not drawn up; and on the same day, the defendant served a rule to change the venue from Essex to London on the common affidavit, and also delivered a plea of non assumpsit. On the 25th, the plaintiff delivered the issue, indorsed with notice of trial for the Chelmsford Assizes. On the 26th, a summons was taken out by the defendant to set aside the issue, as also the notice of trial, on the ground that the venue had been changed, and, therefore, that the trial could not take place at the assizes for Essex. 28th, this summons was attended on the part of the plaintiff, and an order made by Coltman, J., to rescind the rule for changing the venue, and directing that the notice of trial At the following Chelmsford Assizes, the should stand. defendant did not appear; the cause was tried as undefended, and the plaintiff had a verdict. The present rule was then obtained to rescind the order of the learned Judge. On this state of facts two questions arose; first, whether a Judge at Chambers had power to rescind a rule to change the venue; secondly, had his Lordship properly exercised his power. First, it was submitted that a Judge at Chambers had such a power. Except in certain matters, a Judge at Chambers had the same power as the Court in Thus he had a right to set aside a judgment of the Court. This principle was recognised in the case of Rex v. Almon (a). [Wilde, C. J.—The opinion to which you refer was never pronounced in Court by that learned Judge, though printed by him]. Again, in Joseph v. Perry (b), where a Judge at Chambers had modified a rule for a special jury, the Court refused to interfere. No doubt, there were certain cases in which it was specially provided by act of Parliament, that the Court only should exercise power in certain proceedings; but, with those

⁽a) Wilmot's notes, 264.

⁽b) 3 Dowl. 699.

DARBINGTON V. PRICE.

exceptions, a Judge at Chambers could interfere in the same manner as the Court, where the rules of the Court had been improperly obtained or abused. Secondly, assuming that the Judge had power to make the order to rescind the rule, he had properly exercised that power. Obtaining the order for time to plead was a mere trick, for the purpose of gaining time after the time for pleading had expired, and when, consequently, the plaintiff was entitled to sign judgment for want of a plea. Not drawing up the order was, in fact, against good faith; the Court, therefore, would treat the order as if it had been drawn up. If so, then the authorities shewed that the defendant, after obtaining time to plead, was not in a situation to change Thus, in Shipley v. Cooper (a) the Court held, that a defendant cannot change the venue after an order for time to plead on the usual terms; the case of Waring v. Holt (b) was to the same effect. It was said in the latter case, that if the defendant intended the order to be without prejudice to changing the venue, it should be so expressed in the order. On the ground, too, that the proceedings had been against good faith, the Court would not be disposed to interfere. The Court had full power over its own process, and, therefore, might stay proceedings when so taken; Cocker v. Tempest (c). In Amner v. Cattell (d), the Court discharged a rule for changing the venue, on an affidavit that the defendant's attorney had said that he should change the venue to postpone the trial, and that in the interim an act would come into operation which would defeat the plaintiff's claim. On these grounds, it was submitted that the present rule ought to be discharged.

Hawkins, in support of the rule. A Judge at Chambers had no power over a rule of the full Court, unless the Court directed, or the parties consented to its being

```
(a) 7 T. R. 698. & W. 502.
```

⁽b) 3 Price, 3. (d) 5 Bing. 208; S. C. 2 M.

⁽c) 9 Dowl. 306; S. C. 7 M. & P. 367.

disposed of by him; 2 Chitt. Archb. 1433, 8th ed. Maule, J.—That is where the rule has been the subject of discussion before the Court, but not where the rule is a matter of course. The Judge is not in the latter case reviewing what takes place in Court]. With respect to the second point, the defendant's proceedings were perfectly regular, and therefore, he was entitled to succeed in the present application. The time for pleading expired on the 22nd, and the summons for time to plead was not taken out until the 23rd; that could not operate as a stay of proceedings, at the earliest, until the opening of the Judgment Office on the 24th. Throughout the 23rd, therefore, the plaintiff was at liberty to sign judgment as for want of a plca; Sedgewick v. Allerton (a). Taking out a summons for further time to plead was no waiver of the defendant's right to move to change the venue; Wilson v. Harris (b); and the order for time to plead was of no avail until it was served; Sedgewick v. Allerton. With respect to the suggestion of bad faith on the part of the defendant, nothing of the kind existed. The defendant was not bound to draw up the order after the Judge had made it. He was entitled to a reasonable time to consider whether he would draw it up or not. In Hughes v. Walden (c) it was held, that when a defendant obtains a rule, which stays the plaintiff's proceedings; he is entitled to the whole of the day on which the rule is disposed of, for the purpose of taking the next step. Vernon v. Hodgins (d) and Mengens v. Perry (e) recognised that principle. The defendant, therefore, according to all the authorities, was perfectly regular in the steps which he had taken, and had only availed himself of the rights which the practice of the Court conferred on him.

1848. DARRINGTON PRICE.

⁽a) 7 East, 512; S. C. 3 Smith, (d) 4 Dowl. 665; S. C. 1 M. & W. 151. 559.

⁽b) 2 B. & P. 320.

⁽c) 5 B. & C. 770, n.

⁽e) 15 M. & W. 537.

1848.

DARRINGTON

9.
PRICE.

WILDE, C. J.—It appears to me that this rule should be made absolute. As to the question of the jurisdiction of the Judge at Chambers, it is a growing jurisdiction, and no doubt many things are now done there, which would not have been done there thirty years ago. The public has been considerably benefited by the increase of that juris-I do not recollect that it has ever been held in express terms that a Judge at Chambers can set aside a rule of Court. In determining that point I should look to the nature of the proceeding on which the Judge is called There are some steps which are mere upon to decide. matters of practice, and other matters of judicial importance. In the former cases, they are mere steps in which the form of a rule is preserved. In the latter it might be determined that the jurisdiction of a Judge at Chambers should not extend to matters where judicial discretion is to be used. I should say that no such difficulty exists in cases like the present. In Adams on Ejectment, p. 260, 3rd ed., it is said, "If a party should be admitted to defend as landlord, whose title is inconsistent with the possession of the tenant, the lessor of the plaintiff may apply to the Court or to a Judge at Chambers, and have the rule discharged with costs; Doe d. Harwood v. Lippincott; Coram Wood, B., Trinity Vacation, 1817." This was a decision of a very learned Judge, who was not likely to encroach on the jurisdiction of the Court. I see, therefore, no good reason why such a jurisdiction should not exist, leaving it to the discretion of the Judge to determine whether he will Then as to the exercise of the jurisdiction. The defendant ought not to be deprived of his right to change the venue, unless he has improperly conducted A summons is taken out for time to plead, and the effect of that is, to prevent the plaintiff from signing judgment during the whole of the 24th. What right does the defendant waive by taking out a summons in that form? Does he lose all rights to take any incident steps in the

cause? Such an application does not shew that he intended waiving his rights as to changing the venue. It cannot be said that he has made an offer to take short notice of trial, but that is a term imposed on him if he avails himself of the order for time to plead. It seems to me that it would be dangerous to carry the doctrine so far. He has only delayed the plaintiff during the 24th. The plaintiff was at liberty to sign judgment during the 23rd, but he did not do so. I think, before I deprive the subject of the power to have the cause tried where the cause of action arose, I should see stronger grounds than are here shewn. I think, therefore, that the defendant has not waived his right to change the venue, and, therefore, that the present rule must be made absolute.

DARBINGTON v. PRICE.

COLTMAN, J.—I concur in the opinion of the Lord Chief Justice. The doubt which struck my mind, and on which I acted was, that though the defendant might have a right to change the venue, he could not do so after taking out a summons for time to plead, and which he had declined to draw up. It appeared to me, that he then stood in the same situation as if the summons had been dismissed. I, however, acquiesce in the view which the Lord Chief Justice has taken.

MAULE, J.—I also think this rule should be made absolute. It appears to me that the defendant has been regular in all his proceedings. A summons for further time to plead was taken out by him, and on the hearing it was intimated to him that he might have further time to plead if he gave up his right to change the venue. The defendant was then entitled to a reasonable time to determine whether he would take the order on those terms or not. And on the same day that it was made, he elected to abandon it, and then served a rule to change the venue, and delivered his plea on the same day. It appears to me, that the defendant had a right to say he would not take the

1848.

DARRINGTON

v.

PRICE.

order on those terms, and also to change the venue from that mentioned in the declaration. The venue, it appears to me, was properly changed, and, therefore, the rule should be absolute.

CRESSWELL, J.—I am inclined to think that the view taken by my brother Coltman at Chambers was right. I am not aware that a party has time to deliberate whether he will take an order or not. If he will take it, he must be assumed to have taken some benefit under it, and, therefore, should be bound by it. I think, that if the Judge thought that he took the order in order that he might gain time to change the venue, it was quite right to rescind the rule for changing the venue.

Rule absolute.

HARVEY v. JOHNSTON.

A promise to marry by a plaintiff, is not essential to the consideration of the defendant's promise to marry a plaintiff: therefore, where a declaration in assumpsit for breach of promise of marriage alleged the consideration for the defendant's promise to be

Cockburn and Phinn shewed cause against a rule nisi obtained by Kinglake, Serjt., for leave to enter a nonsuit. It was an action of assumpsit for breach of promise of marriage. The declaration alleged, that whereas heretofore, and before and at the time of the making of the promise of the defendant next hereinafter mentioned, to wit, on, &c., the plaintiff was sole and unmarried, and resided at parts beyond the seas, to wit, at Toronto, in America, and thereupon, to wit, on the day and year aforesaid, "in consideration that the plaintiff so then being sole and unmarried as aforesaid, would go to Lisahoppin, in the

"that the plaintiff, being sole and unmarried, would go to Lisahoppin, in that part of the United Kingdom of Great Britain and Ireland called Ireland, for the purpose of marrying him the defendant:" it was held that the consideration was sufficient.

At his prius, proof being given of a promise by the plaintiff to marry the defendant, the Judge allowed the consideration to be amended, by adding the words "and would, within a reasonable time after her arrival there, marry the defendant:" Held, that the amendment was authorized by the 3 & 4 Wm. 4, c. 42, s. 23, and that the fact of the amendment curing a defect which would otherwise render the declaration bad in arrest of judgment, was no objection to the amendment.

county of Tyrone, in that part of the United Kingdom of Great Britain and Ireland called Ireland, for the purpose of marrying him the defendant," he, the defendant, then promised the plaintiff to marry her, the plaintiff, in a reasonable time after her arrival at Lisahoppin aforesaid. And the plaintiff avers that she, confiding in the said promise of the defendant, in a reasonable time in that behalf after the making of the said promise, and before the commencement of this suit, to wit, on the day and year aforesaid, did, at the request of the defendant, go to and arrive at Lisahoppin aforesaid, in the county of Tyrone aforesaid, in that part of the United Kingdom of Great Britain and Ireland called Ireland, for the purpose of marrying the defendant, of all which the defendant then, in a reasonable time in that behalf afterwards, to wit, on the day and year last aforesaid, had due notice; and although the plaintiff, after the making of the said promise, from the time of her said arrival at Lisahoppin aforesaid, till the expiration of a reasonable time next after her said arrival at Lisahoppin aforesaid, for the defendant to marry the plaintiff, was and continued to be sole and unmarried, and ready and willing to marry him, the defendant, of which last-mentioned premises respectively the defendant also, to wit, during all such last-mentioned time, then had due notice; and although a reasonable time in that behalf after the arrival of the plaintiff at Lisahoppin as aforesaid, for the defendant to marry the plaintiff had elapsed, before the commencement of this suit; yet the defendant, not regarding his said promise, did not nor would, in a reasonable time after the arrival of the plaintiff at Lisahoppin as aforesaid, or at any time before or afterwards, marry the plaintiff, but wholly neglected so to do. By reason whereof. &c. The defendant pleaded non assumpsit and several special pleas, but the question in the cause arose upon the first plea. The cause was tried at the Summer Assizes, 1847, for the county of Hants, before Wilde, C. J. Evidence was given of the promise on the part of the

HARVEY

b.

JOHNSTON.

HARVEY

9.

JOHNSTON.

defendant alleged in the declaration, and also evidence was given of a promise on the part of the plaintiff to marry the defendant, after her arrival at Lisahoppin. close of the plaintiff's case, the defendant's counsel applied for a nonsuit, on the ground that a consideration for the defendant's promise different from that which was alleged in the declaration had been proved. The plaintiff then applied to be permitted to amend the declaration, by stating the consideration in this form: "in consideration that the plaintiff so then being sole and unmarried as aforesaid, at the request of the defendant, then promised the defendant to marry him, and would go to Lisahoppin, &c., for the purpose of marrying him the defendant, and would within a reasonable time after her arrival there, marry the defendant." The Lord Chief Justice allowed this amendment, and the plaintiff had a verdict, with 400L damages. Leave was given to the defendant to move to enter a nonsuit, if the Court should be of opinion that the amendment could not properly be made in pursuance of 3 & 4 Wm. 4, c. 42, s. 23. The present rule was accordingly obtained. It was submitted that the amendment was perfectly justified. The first objection to the amendment was, that the Judge had no power to vary the consideration in the manner here done by the amendment. Now, the words of the statute were, that the Judge should have power to amend in any matter "not material to the merits of the case." Now, what must properly be considered as the merits of the case in the present instance was, the promise of the defendant to marry the plaintiff, that promise being supported by a valid consideration. The mode of stating the promise and the consideration could not be material to the merits of the case, and could not have prejudiced the defendant in the conduct of his defence. Similar amendments had been allowed in former cases, and recognised by the Courts. Thus in Duckworth v. Harrison (a), in an action on an

agreement of reference, it appeared that the agreement provided for the costs of making the agreement a rule of Court, and it was held that the declaration might be amended by the introduction of that clause. So in Goldshede v. Swan (a), the Court of Exchequer intimated that where there was a defective statement of a consideration of a guarantee, it might, if necessary, be amended. next objection to making the amendment was, that the effect of it would be to deprive the defendant of his right to move in arrest of judgment, because by the introduction of the words contained in the amendment, the declaration was rendered good. Independent, however, of the amendment, there was no defect in the declaration, as a sufficient consideration for the defendant's promise was disclosed. It was not necessary that the plaintiff should promise to marry the defendant in order to render the promise of the latter binding. In the law, many unilateral contracts were recognised; thus in the case of a guarantee; Kennaway v. Treleavan (b); and Morton v. Burn and Another (c). Again, in the case of a reward claimed for the apprehension of a felon, there was no obligation on the part of the person, who gave such information as led to the apprehension of the offender, to give that information. Yet it was held, that if the information was given, it was a good consideration for a promise to pay a reward; England v. Davison (d). [Maule, J. -In the case of a servant who promises to obey his master's lawful commands, there is no obligation on the master to give any lawful commands.] With regard to promises to marry, it had been held in Holt v. Ward, Clarencieux (e), that an infant might sue for a breach of promise of marriage given by a person of full age; and in Atkins v. Farr (f), the Court held that a bond given for the marriage of the defendant with the plaintiff was valid, although there was

HARVEY

5.

JOHNSTON.

⁽a) 1 Exch. 154. (b) 5 M. & W. 498. (c) 7 A. & E. 19; S. C. 2 N. & P. 297. (d) 11 A. & E. 856; S. C. 3 P. & D. 594. (e) 2 Str. 937. (f) 1 Atk. 287.

HARVEY
v.
JOHNSTON.

no mutuality in the contract. The same principle was recognised in Forth v. Staunton, 1 Wms. Saund. 210, 6th ed.; Barber v. Fox, 2 Wms. Saund. 210, note (2); Laythoarp v. Bryant (a). The idea of such promises to marry being necessarily mutual in order to sustain an action for a breach of promise of marriage, appeared to arise from a misapprehension of the civil law upon this subject. In the Digest, lib. 23, tit. 1, art. 1, in speaking, "De Sponsalibus," it was laid down, "sponsalia, sunt mentio et repromissio nuptiarum futurarum." That passage, however, applied to betrothal, which was quite different from the mere promise to marry on a future occasion. The "sponsalia" was a solemn act, to which the mutuality of the promises was an essential (b). No argument, however, could be drawn so as to affect our law with respect to the contract to marry.

C. Saunders supported the rule. The amendment made by the learned Judge in the present case was not authorized by the language of the statute, as the effect of it was to make valid a declaration which was essentially defective. Such an alteration could not be considered as "not material to the merits of the case." It never could have been the intention of the Legislature to render good such pleadings as were originally and essentially vicious. Thus, in Bowers v. Nixon (c), Maule, J., ruled, "that the enactments for allowing amendments at nisi prius were intended to meet variances arising from mere slips or accidents, and that they do not extend to a case like the present, in which the party has intentionally and designedly framed his pleading in a manner which gives rise to this objection." His Lordship refused the amendment in that case. So in Bye v. Bower

⁽a) 2 Bing. N. C. 735; S. C. 3 Scott, 238.

⁽b) By l. 2, the origin of the expression sponsalia is given "Sponsalia dicta sunt a spon-

dendo. Nam moris fuit veteribus, stipulari, et spondere sibi uxores futuras."

⁽c) 2 C. & K. 374.

and Another (a), Parke, B., refused to amend a declaration in replevin, by introducing additional premises as those in which the taking had been effected. His Lordship said, "I think that I ought not to allow this amendment. It is an omission that you are asking to amend, and not a variance." Those two cases were in point to shew that, where an omission existed, the Court would not allow an amendment for the purpose of supplying it. Atkinson v. Raleigh (b), Lord Denman, in speaking of an amendment which, if permitted, would have the effect of making a bad declaration good, and thereby deprive the defendant of his right to move in arrest of judgment or bring a writ of error, said, "it is unnecessary to inquire whether or not the amendment could have been made, otherwise I should have required time before I could have said that such a course could be allowed; I do not think it would have been conformable to the object of the statute, which was to prevent nonsuits and variances, and not to make pleadings good which are vicious in themselves." [Cresswell, J.—In that case there was no variance, and, therefore, the ground for applying for an amendment failed. Maule, J.—In the late case in this Court of Lawes v. Brown (c) it was held, that no ground was afforded for refusing to amend, because it would make a bad pleading good]. All the forms of declarations for breaches of promise of marriage stated a promise by the plaintiff as well as by the defendant; 2 Chitt. Plead. p. 237, 7th ed. [Cresswell, J.—The reason for that is, that in most cases the facts shew that there is no other consideration for the defendant's promise, and, consequently, if that were not stated, the promise of the defendant would be nudum pactum. Maule, J.—If it were held that, in order to support a promise of marriage from one party, a previous promise from the other was invariably requisite

HARVET

U.

JOHNSTON

⁽a) 1 Car. & M. 262.

⁽c) Not reported.

⁽b) 3 Q. B. 79; S. C. 2 G. & D. 611.

HARVEY

JOHNSTON.

by way of consideration, there never could be a valid first promise]. In *Harrison* v. *Cage* (a) the declaration in the form, alleging a promise by the plaintiff, was established.

WILDE, C. J.—I think that the rule for a nonsuit in this case must be discharged. The first ground urged in support of the rule is, that the amendment of the declaration was made by me in a part of the declaration "material to the merits of the case." What the meaning of those words is has frequently been considered by the Courts, and the meaning of them I take to be, "material to the real substantial question at issue in the cause." Now in the present instance the real question between the parties was, whether the defendant had made the promise alleged to marry the plaintiff, and had broken that promise. In what precise mode the consideration for that promise was stated does not appear to me to have been material to the merits of the case. At the trial, I entertained some doubt whether, as making the amendment prayed for would deprive the defendant of his applying to arrest the judgment, I ought to make it. However, as the application was made on the ground of variance, and as I was of opinion that it was not "material to the merits of the case," I made it; and I did not think it was any part of my duty to consider what might be the consequences of making that amendment. Since then, in the case of Lawes v. Brown (b), it has been decided, that it is not any objection to an amendment that it may have the effect of preventing a declaration from being bad in arrest of judgment. With respect to any supposed hardship on the defendant in being thus deprived of his motion in arrest of judgment, he may prevent that by abstaining from applying for a nonsuit at the trial, and then the objection on the record will remain open to him. Under these circumstances, I am of opinion that the amendment was properly allowed.

(a) 1 Ld. Raym. 386.

(b) Not reported.

COLTMAN, J.—I concur in the opinion of the Court on the other points (a), but I do not think it necessary to advert to the question of whether the amendment was proper or not. HABVEY

0.

JOHNSTON.

MAULE, J.—I am also of opinion that this was a proper case for amendment. By the 3 & 4 Wm. 4, c. 42, s. 23, in case of any variance between the proof and the record in any particular "in the judgment of such Judge, not material to the merits of the case," the Judge may cause the record forthwith to be amended. In the declaration, as originally drawn, a promise by the defendant to marry the plaintiff was stated, and therefore, the merits which the parties came there to try were, whether the promise had been made by the defendant, and if it had, whether he was to pay for breaking it. The declaration, as I think, before the amendment, contained a good consideration for the defendant's promise; but it was contended, that the real consideration for his promise was the antecedent promise of the plaintiff to marry him. The distinction between the two considerations is such as none but a special pleader could perceive, and as far as the merits of the case are concerned, the two statements are equivalent.

CRESSWELL, J.—I am entirely of the same opinion. As to the amendment, I think it was properly made. It was objected that it deprived the defendant of his motion in arrest of judgment. That objection, however, fails on two grounds. The first is, because the declaration would have been good on motion in arrest of judgment, as it stood before the amendment was made; and secondly, that the power to amend does not depend on the goodness of the pleading. If the power depends upon the question whether or not a declaration is good upon motion in arrest of judgment, an amendment can never be made until the House

(a) There was a question raised in the case as to whether the evidence supported the declaration as amended. The Court was unanimously of opinion that the evidence did support it. HARVEY

5.

JOHNSTON.

of Lords has determined whether the declaration is good. The Legislature certainly never could have intended that to be the case. I think the present rule, therefore, ought to be discharged.

Rule discharged.

Humphries v. Longmore and Smith.

A writ issuing from an inferior Court must be tested on a Court day.

TALFOURD, Scrit., shewed cause against a rule nisi obtained by Allen, Serjt., to enter a verdict in favour of the defendants. It was an action of trespass de bonis asportatis. The defendant Smith pleaded a justification as the attorney of the defendant Longmore, under a writ of levari facias, sued out of the hundred Court of Offlow, to levy a debt of 2s. 6d., and 7L 6s. 11d. costs, recovered by Longmore The defendant Longmore suffered against the plaintiff. judgment by default. At the trial, before Coleridge, J., at the Stafford Assizes, the jury found a verdict in favour of the plaintiff; but liberty was given to the defendant to move to enter a verdict for himself, if the Court should be of opinion that he was entitled to do so. One objection, amongst others, it was submitted, was clearly fatal to the application. The writ of levari facias under which the defendant Smith pleaded his justification, was neither tested nor returnable on a Court day. The case of Morse v. James and Others (a) was a clear authority to shew that a writ issued out of an inferior Court not tested on a Court day was void.

Gray, (Allen, Serjt., with him), admitted that the case cited was not distinguishable from the present.

Per Curiam.—The rule must be discharged.

Rule discharged.

(a) Willes, 122.

COURT OF QUEEN'S BENCH.

Crinity Cerm.

IN THE ELEVENTH YEAR OF THE REIGN OF VICTORIA.

BRAHAM v. HUNTER.

THIS was a rule calling upon the plaintiff to shew cause A writ of ca. why the writ of capias ad satisfaciendum, exigi facias, and sa. to proceed to outlawry all subsequent proceedings to outlawry herein should not was tested on the 12th of be set aside.

The affidavit in support of the rule, shewed that the writ the 15th of capias ad satisfaciandum in the 1 of capias ad satisfaciendum in the above cause had issued April then next. The on the 12th of March, 1847, returnable on the 15th of writ of exigi April then next. That the writ of exigi facias was issued tested on the on the 16th of April, 1847, tested on the 15th of April, 1847, returnand returnable on the 12th of June then next. And that able on the 12th of June the writ of allocatur exigent was issued on the 23rd of then next. June, 1847, tested on the 12th of June, and returnable on motion to set the 2nd of November then next.

1848.

Held, on aside the proceedings, that both writs

were wrong; the ca. sa. in being tested in Vacation, and the exigi facias in not being tested on the quarto die post of the return of the capias, and in not being made returnable either on the third day exclusive before the commencement of Term, or between that day and the third day exclusive before the last day of Term, according to the 1 Wm. 4, c. 3, s. 2; but that the defects amounted only to an irregularity, which might be waived.

VOL. VI. D. & L. BRAHAM b. HUNTER. The affidavits in answer set out facts which, if the proceedings were merely irregular, amounted to a waiver of the irregularity.

S. Temple shewed cause (a). The objections to the writs are, that the ca. sa. is tested in Vacation instead of in Term; that the exigi facias is returnable on the last day of Term, instead of on some day, being either the third day exclusive before the commencement of Term, or between that day and the third day exclusive before the last day of Term; and that the allocatur exigent is bad for want of the preceding writs, if they are void. It is submitted, that these writs are regular. The ca. sa. is properly tested on the day on which it issued, and the writ of exigi facias does not come within the 2nd section of 1 Wm. 4, c. 3, which requires writs returnable on general return days, to be made returnable "on the third day exclusive before the commencement of each Term, or on any day, not being Sunday, between that day and the third day exclusive before the last day of Term;" but rather within the 5th section of 2 Wm. 4, c. 39, which says, they shall be returnable "on a day certain in Term." At any rate, the Court will not decide this question upon motion, but will leave the party to his writ of error; Sandford v. Wyatt (b). In that case the objection was, that the writ of capias ad satisfaciendum was made returnable immediately after the execution, and that, in order to proceed to outlawry, it ought to have been made returnable on a day certain with fifteen days between the teste and the return; and Mr. Justice Wightman refused to interfere on motion to set aside the writ and subsequent proceedings to outlawry, saying, that he thought it inexpedient to decide the point on motion, but that he left the defendant to his writ of error. But even should this reason not weigh with the Court on the

present occasion, it is submitted that the writs are at most but irregular; and if so, the irregularity, under the circumstances mentioned in the affidavits, has been waived, and the Court will not interfere; Anderdon v. Lord Stirling (a); Lewis v. Davison (b).

BRAHAM
v.
HUNTER.

Lush, in support of the rule. It may be admitted, that if the writs are simply irregular, the defect is waived under the circumstances of the present case. But it is submitted that they are void. According to the old practice a writ of execution ought to be tested in Term and made returnable on a general return day; Tidd's Pract. p. 1027, 9th ed.; and the exigi facias ought to be tested on the quarto die post of the return of the capias; Ibid. p. 132. Then came the stat. 1 Wm. 4, c. 3, s. 2, which requires all writs "usually returnable" "on general return days," to be made "returnable on the third day exclusive before the commencement of each Term, or on any day not being Sunday, between that day and the third day exclusive before the last day of Term." The 5th section of the 2 Wm. 4, c. 39, applies only to outlawry on mesne process. Section 6, regulates the proceedings to outlawry on final process. That section enacts, "that after judgment given in any action," &c. "proceedings to outlawry or waiver may be had and taken, and judgment of outlawry or waiver given, in such manner, and in such cases, as may now be lawfully done after judgment in an action commenced by original writ." Consequently, the 1 Wm. 4, c. 3, s. 2, is not repealed as to cases where the proceedings to outlawry are after judgment. The writs are, therefore, void: the ea. sa. as not being tested in Term according to the old practice, or being made returnable in Term; the exigi facias as being made returnable on a day on which it ought not to be returnable; and the allocatur exigent for not having a sufficient ca. sa. and exigi facias to

⁽a) 2 Dowl. 267. (b) 3 Dowl. 272; S. C. 1 C., M. & R. 655.

BRAHAM v. HUNTER.

support it. The case of Kenworthy v. Peppiat (a), is an authority that a writ returnable on a dies non is altogether void and cannot be amended by the Court. Court said, that an amendment in this respect would be to make a new writ. That decision has been confirmed in a case of Bosanquet v. Graham (b). In a late case in this Court of Lewis v. Holmes (c), it was held, that a writ of ca. sa., returnable immediately after the execution, would not support proceedings in outlawry, which were accordingly set aside. That case is since Sandford v. Wyatt (d), and was decided by the full Court. The 1 Wm. 4, c. 3, s. 2, is not merely directory. Writs must be issued in conformity with its enactments. [Coleridge, J.—Are you aware of the case of Walker v. Hawkey (e)? There, a writ of capias ad respondendum which ought to have been made returnable on a general return day, was made returnable on a day certain; and the Court permitted it to be amended, even after a rule nisi to quash it for irregularity.] That was before the statute 1 Wm. 4, c. 3.

Cur. adv. vult.

COLERIDGE, J., now delivered judgment.—This was a rule to set aside the ca. sa., exigi facias, and all the subsequent proceedings to outlawry. On shewing cause against it, it was contended that the proceedings were regular; or at most only irregular, in which alternative it was admitted that the application came too late: but it was argued that the defects relied on in the writs of ca. sa. and exigi facias made them respectively nullities.

The ca. sa. was tested on the 12th of March, 1847, and made returnable on the 15th of April. Under the 3 & 4 Wm. 4, c. 67, s. 2, "all writs of execution may be tested on

⁽a) 4 B. & A. 288. See Badham v. Bateman, ante, vol. 2, p. 130.

[.] Dateman, ante, vol. 2, p. 150

⁽b) Reported in 7 Jur. 831.

⁽c) 16 Law Jour. Q. B. 430.

⁽d) 2 Dowl. 2, N. S.

⁽e) 5 Taunt. 853; S. C. 1 Marsh. 399.

the day on which the same are issued, and be made returnable immediately after execution thereof." In Lewis v. Holmes, founded on Kemp v. Hyslop (a), the Court of Queen's Bench decided, that a writ issued under this statute, could not be made the foundation of proceedings to outlawry; for it could not, strictly speaking, be returned, even under a Judge's order, before execution, not being made returnable originally until then; and if executed, there could of course be no ground to proceed to outlawry. A writ, therefore, for that purpose ought to issue according to the old form, according to which it ought to be both tested and made returnable in Term time. The present writ appears to satisfy neither the old nor the new form; it is tested in Vacation and made returnable on a day certain in Term.

The exigi facias was tested on the 15th of April and made returnable on the 12th of June, which would have been correct under the 5th section of 2 Wm. 4; but this being a proceeding after judgment, is governed by the 6th section, which directs such writ to be issued in the same manner as was lawful before the act after judgment in an action commenced by original writ. According to this, the exigi facias should have been tested, not on the return day, but the quarto die post of the return of the capias; and it should have been made returnable, not on the last day of the Term, but on some day being either the third exclusive before the commencement of Term, or between that day and the third day exclusive before the last day of the Term, according to the 1 Wm. 4, c. 3, s. 2.

Both writs, therefore, are wrong. The defect in the capias is that it is dated in Vacation; now that objection does not make it no writ. The Court had authority to issue such a writ, and if the defendant had been taken under it, the execution would have been valid, or at most it would have been irregular only, and could not have been set aside after any laches amounting to a waiver. This then

BRAHAM

D.

HUNTER.

BRAHAM

D.

HUNTER.

brings it within the distinction which the Court took in Kenworthy v. Peppiat (a). There, an application was made to amend a bill of Middlesex made returnable on a dies non. The Court refused the application, and set aside the writ, saying, "it was altogether void, and was distinguishable from the cases of amendment of the party's name, where as a writ it was good, though not applicable to the particular case." Au analogous case is that of Paul v. Garry (b), where a bill was filed against the defendant as an attorney, who, in fact, was not an attorney; it was contended that the proceedings were absolutely void, but the Court held them only irregular, and cured by the waiver of the defendant. In Inman v. Huish (c), where in the Common Pleas, a testatum capias was made returnable on a day certain, instead of a general return day, it was held irregular, and the Court refused leave to amend, only because the bail would be affected by it; and in Walker v. Hawkey (d), a capias with the same defect was amended on payment of costs. I need not observe, that every case of amendment is in point on the question whether the defect is such as to avoid the writ, or only to make it voidable.

Upon the authority of these cases, it seems to me that the ca. sa. was only irregular. The exigi facias was defective both in its teste and return; and the question is, whether these defects may be tried by the principle which those cases establish, and if so, what will be the result? It appears to me that the effect of the 6th section of the 2 Wm. 4, c. 39, above referred to, is to place the Court, as to proceedings to outlawry after judgment, in the same situation exactly, as it stood in before at common law, after judgment in an action commenced by original writ; the regularity of proceedings must be tested by reference to the old practice in such cases, and the Court has the same power both as to the issuing of the writs and as to amendment. Now the

⁽a) 4 B. & A. 288.

⁽b) 6 B. & C. 77, n. (b).

⁽c) 2 N. R. 133.

⁽d) 5 Taunt. 853.

exigi facias is a judicial writ, and where such a writ has been both issued and made returnable in Term time, Mr. Lush's industry has not furnished us with any instance in which it has been held void, because either the teste or return was too early or too late. He cited two cases, Kenworthy v. Peppiat, in which the return was on a dies non, and Bosanguet v. Graham (a), in which a scire facias was tested in Vacation; both the writs were held void. Mills v. Bond (b), is an authority to the same effect. The distinction, however, is obvious, and where an attachment of privilege sued out by an attorney in Common Pleas, which regularly ought to be returnable in full Term, was made returnable between the essoign day and the quarto die post, the Court allowed it to be amended; the reason is not stated, but I presume, because the interval was taken to be sufficiently a part of the Term for this purpose, to give the Court jurisdiction; Adams v. Luck (c). In the absence then of any authority distinctly for holding the exigi facias a nullity, and with some authority, and a satisfactory principle for the contrary, I cannot make this rule absolute.

If the view which I take be wrong, the defendant is not without his remedy by writ of error, and acting as my Brother Wightman did in Sandford v. Wyatt (d), I leave him to that remedy.

Rule discharged.

- (a) Reported in 7 Jur. 831.
- (c) 3 B. & B. 25.

(b) Stra. 399.

(d) 2 Dowl. 2, N. S.

BRAHAM
v.
Hunter.

1848.

WHARTON and Another v. NAYLOR and Another.

(In the full Court.)

Growing crops seized by the sheriff under a fi. fa., and not severed from the land. are in the custody of the law, although in the hands of the execution creditor under a bill of sale from the sheriff. They, therefore, cannot be distrained for antecedent rent of which the sheriff and the execution creditor had notice, but which they neglected to pay; the remedy of the landlord being by action on the case against the sheriff, and not by way of distress.

Trespass for breaking and entering the closes of the plaintiffs, and cutting down and taking away growing crops. Plea, that one J. L. held the

DECLARATION in trespass. The first count was for breaking and entering certain closes of the plaintiffs, and reaping, mowing, and cutting the wheat and oats of the plaintiffs; and the second count was for taking and carrying away certain quantities of wheat, oats, and straw, of the plaintiffs.

Fourth plea to the first count. That one John Lind, for a long time, to wit, &c., next before, &c., and from thence until, &c., held the closes in which, &c., in the first count mentioned, together with other premises, as tenant thereof to the defendants, under a certain demise, &c. being a half-year's rent, was, at the said time when, &c., in Wherefore the defendants, on the said first day when, &c., did enter, &c., in order to distrain, and did then distrain for the said rent; and afterwards, to wit, on the day last aforesaid, and when the said wheat and oats were ripe, did gather and cut the said wheat and oats for the purpose, and in order that the defendants might carry, lay up, and impound the said wheat and oats, as such distress as aforesaid, on the most proper, fit, and convenient part of the said premises so held, &c., according to the form of the A sixth plea stated the rent to be in arrear as in the fourth plea, and that the goods in the second count mentioned were upon the premises so held by John Lind, and liable to be distrained; and justified taking them as a distress.

closes as tenant thereof to the defendants, under a certain demise, &c., and that half a year's rent being in arrear, defendants entered to distrain. Replication, shewing a judgment at the suit of the plaintiffs against J. L., and a fi. fa. under which the sheriff seized the crops in question, and sold them to the plaintiffs, and that before a reasonable time had elapsed for cutting and gathering them, the defendants distrained and seized thereon. Rejoinder, that the rent for which the distress was made, became due long before the judgment; that the sheriff and the plaintiffs had due notice of it; that it continued in arrear, and did not exceed one year's rent; that they required the sheriff, before he sold to the plaintiffs, to pay the rent, of which also the plaintiffs had notice, and that it was not paid.

Held, on demurrer, that the rejoinder was bad.

Held also, that the replication was good, and was not a departure from the declaration.

Replication to the fourth plea. That before the said times when, &c., in the said first count mentioned, the plaintiffs recovered a judgment in the Court of Queen's Bench against John Lind for 3771 8s. 5d. debt, and 9l 19s. costs, and that the plaintiffs sued out a writ of fieri facias to levy the above sums, which writ was delivered to the sheriff. who, by virtue thereof, seized the wheat and oats in the first count mentioned, the same being the growing crops of the said John Lind, and being of great value, &c.; and thereupon within a reasonable time afterwards, and before the said times when, &c., and before the defendants entered and distrained, as in the said fourth plea mentioned, and whilst the said writ remained in full force, to wit, on, &c., the sheriff duly bargained, sold, and assigned the said wheat and oats so seized and taken in execution, and so being the growing crops of the said John Lind as aforesaid, to the now plaintiffs, for 381 10s.; and the now plaintiffs thereupon became and were possessed of the said wheat and oats, then being growing crops, until the said times when, &c.; and that before a reasonable time had elapsed for the cutting and gathering the said wheat and oats by the plaintiffs, and whilst the same were growing, to wit, on, &c., the defendants entered and distrained, and afterwards cut and gathered the same, as in the fourth plea mentioned. Verification. A similar replication to the sixth plea.

Rejoinder to the replication to the fourth plea. That the said rent so due and in arrear as in the said fourth plea mentioned, became so due and in arrear long before the said time when the plaintiffs sued and prosecuted out of the said Court the said writ in the said replication mentioned, and long before the day of the teste of the same writ, and long before the said time when the said writ was delivered to the said sheriff, as in the said replication alleged, and also long before the said time when the said sheriff seized and took in execution the said wheat and oats as in the said replication mentioned, in manner and form, &c., to wit, on, &c.; of all which premises the plaintiffs,

WHARTON and Another

NAYLOR and Another.

WHARTON and Another v. NAYLOR and Another.

and also the said sheriff, before the said time when the said sheriff bargained, sold, and assigned the said wheat and oats to the plaintiffs as in the said replication mentioned, to wit, on, &c., had notice; and that the said last-mentioned wheat and oats, at the said time when the same wheat and oats were seized and taken in execution, were certain wheat and oats which were in and upon the said closes in which, &c., in the said first count and fourth plea respectively mentioned, whereof the plaintiffs, and also the said sheriff, then and before the said time when the said sheriff bargained, sold, and assigned the said wheat and oats to the plaintiffs as in the said replication mentioned, to wit, on, &c., had notice; and that the said rent so due and in arrear to the defendants as aforesaid, from the time when the same rent became so due and payable as aforesaid, until and at the said time when the said wheat and oats were so seized and taken in execution as aforesaid, and also until and at the said time when the said sheriff bargained, sold, and assigned the said wheat and oats to the plaintiffs as aforesaid, was and continued to be due and payable from and by the said John Lind, and in arrear and unsatisfied to the defendants, as the landlords of the said closes in which, &c., whereof the plaintiffs, and also the said sheriff, before the said time when the said sheriff bargained, sold, and assigned the said wheat and oats to the plaintiffs as aforesaid, to wit, on, &c., had notice; and that the said rent so due and in arrear as aforesaid, at the said time when the said wheat and oats were so seized and taken in execution as aforesaid, and also at the time when the said sheriff bargained and sold the said wheat and oats to the plaintiffs, did not amount to more than one year's rent of the said closes and premises in the said fourth plea mentioned, and then amounted to and was a certain sum of money, to wit, the sum of 40L, being the amount of the said rent for the said half-year; of all which premises the plaintiffs, and also the said sheriff, before the said time when the said sheriff bargained and sold the said wheat and oats to the plaintiffs as aforesaid,

to wit, on, &c., had notice; and the defendants then and before the said time when the said sheriff bargained, sold, and assigned the said wheat and oats to the plaintiffs as aforesaid, required the said sheriff, to wit, on, &c., to pay to the defendants the said rent so due and in arrear to them as aforesaid, before the said wheat and oats, or any part thereof, should be sold and removed from or out of the said closes and premises, of which the plaintiffs, and also the said sheriff, then had notice; and that the said wheat and oats were so seized and taken in execution as aforesaid. long after the 1st of May, 1710; and that the plaintiffs did not, nor did the said sheriff or any other person, at any time before the said time when the said sheriff bargained, sold, and assigned the said wheat and oats to the plaintiffs, or at any time before the said time when, &c., in the said first count mentioned, pay to the defendants so being such landlords as aforesaid, or to their bailiff, the said rent so due and in arrear as aforesaid, or any part thereof; wherefore the defendants, on the said day when, &c., did enter into and upon the said closes in which, &c., for the purpose and in order to seize, take, and distrain the said wheat and oats as and for a distress for the said rent so due and in arrear as aforesaid, and afterwards cut and gathered the same as in the fourth plea mentioned, as the defendants lawfully might, for the causes hereinbefore and in the said fourth plea mentioned; of all which premises the plaintiffs then had notice; which are the same supposed trespasses in the said first count mentioned, and which are in the fourth plea above justified. Verification. A similar rejoinder to the replication to the sixth plea.

Demurrer to the rejoinder to the replication to the fourth plea. That the rejoinder confessed the facts stated in the replication, and did not avoid them. That it ought to have shewn a seizure for the rent anterior to the seizure and sale by the sheriff. That the landlord could not legally distrain the crops which had been legally seized by the sheriff and sold to the plaintiffs, before a reasonable time for the plaintiffs to gather and remove them had elapsed. And that the

WHARTON and Another v. Naylon and Another

WHARTON and Another v.
NAYLOR and Another.

rejoinder should have shewn that the crops were removed from the premises by the sheriff or the execution creditor, without paying the landlord a year's rent. A similar demurrer to the other rejoinder.

Joinders in demurrer.

The defendants' points for argument were, amongst others, that the crops were not, at the time of the distress, in the custody of the law, or otherwise protected against the distress. That the replication was a departure from the declaration, as the first count alleged the closes to be the closes of the plaintiffs; but the replication admitted that at the times when, &c., they were the closes of John Lind. That the sheriff having, after notice of the rent being due, proceeded to a sale under the execution, his bill of sale to the plaintiffs was void at all events, as against the defendants; and the plaintiffs could not, by their own unlawful act in proceeding with their execution, defeat the defendants' claim or remedy for their rent. And that both counts of the declaration, and both the replications, were bad and insufficient.

W. H. Watson, in support of the demurrers.

Hindmarch, contrà.

The following cases and authorities were referred to in the course of the argument; Peacock v. Purvis (a); Smallman v. Pollard (b); Cocker v. Musgrove (c); Blades v. Arundale (d); Wintle v. Freeman (e); stat. 8 Ann. c. 14, s. 1; stat. 11 Geo. 2, c. 19, s. 8.

Cur. adv. vult.

Lord Denman, C. J., now delivered (f) the judgment of the Court (g).—

- (a) 2 B. & B. 362. (b) 6 M. & G. 1001; S. C.
- (b) 6 M. & G. 1001; S. C. ante, vol. 1, p. 901; 7 Scott. N. R. 911.
 - (c) 9 Q. B. 223.
 - (d) 1 M. & S. 711.

- (e) 11 A. & E. 539; S. C.
- 1 G. & D. 93.
 - (f) In Trinity Vacation.
- (g) Lord Denman, C. J., Patteson, J., Coleridge, J., and Erle, J.

The declaration in this case contains two counts in The first for breaking and entering the closes of the plaintiffs, and cutting down growing crops of corn. The second upon a cepit and asportavit. The defendants plead to the first count, and justify under a distress for rent due for the closes from one John Lind. They also plead a similar plea to the second count. The plaintiffs reply separately to each plea, shewing a judgment at the suit of the plaintiffs against John Lind, and a writ of fieri facias under which the sheriff seized the growing crops in question and sold them to the plaintiffs, and that before a reasonable time had elapsed for cutting and gathering them, the defendants distrained and seized thereon. The defendants rejoin that the rent for which the distress was made became due long before the judgment; that the sheriff and the plaintiffs had due notice of it; that it continued in arrear and did not exceed one year's rent; that they required the sheriff, before he sold to the plaintiffs, to pay the rent, of which also the plaintiffs had notice, and that it was not The plaintiffs demurred. paid

On the argument it was contended for the defendants, that as regards the first count the replication was a departure, inasmuch as the count alleges the closes to be the closes of the plaintiffs, whereas the replication shews them to have been the closes of John Lind. We think that there is nothing in this point. The plea being in confession and avoidance, admits the possession of the plaintiffs at the time when the trespass complained of was committed, and there is nothing in the replication inconsistent with that fact, for it only admits the rent to be due from J. Lind, and that he was in possession when the sheriff entered under the fieri facias, long antecedent to the trespass complained of; both of which circumstances are quite consistent with the possession of the plaintiffs at the time of that trespass.

The principal question in the case is, whether the growing crops so seized by the sheriff and sold to the plaintiffs, could

WHARTON and Another v. NayLon and Another

WHARTON and Another v.
NAYLOR and Another.

be distrained for antecedent rent, of which the sheriff and the plaintiffs had notice, and which they neglected to pay.

That goods which are in the custody of the law cannot be distrained for rent is clear; the point, therefore, is, whether these crops are to be considered to have been in such custody, though in the hands of a vendee under the sheriff, and not of the sheriff himself; Peacock v. Purvis (a). In that case, it is true that the rent distrained for accrued after the seizure under the fieri facias, but still it establishes the principle that the crops in the hands of the sheriff's vendee are as much in custodiâ legis as if in the hands of the sheriff, until they are in such a state as to be capable of removal.

We have then to consider what is the effect of the statute 8 Ann. c. 14, s. 1, whether goods seized by the sheriff under a writ of fieri facias are prevented by the operation of that statute from being in custodiâ legis, so far as regards the landlord's right of distress for one year's rent then duc.

The statute says "that no goods," &c. "shall be liable to be taken by virtue of any execution" "unless the party at whose suit the said execution is sued out, shall, before the removal of such goods from off the said premises, by virtue of such execution," &c., "pay to the landlord of the said premises" the rent due, not exceeding one year's rent.

These words cannot be taken literally. The true construction is given in Riseley v. Ryle (b), by Parke, B. The meaning is, that the sheriff shall not remove the goods unless a year's rent be first paid. The seizure is lawful primâ facie; but if the goods be removed without payment of the rent, after notice that it is due, such removal renders the whole proceeding unlawful as regards the landlord, and subjects the sheriff to an action on the case at his suit. The goods, however, in the meantime until they are removed, are in custodiâ legis. A bill of sale of the goods is not a removal, as was established in the case of Smallman

v. Pollard (a). If, indeed, the sheriff receives the proceeds under such bill of sale either from a stranger vendee absolutely, or from the execution creditor constructively, he being an officer of the Court will be compelled on motion to pay over a year's rent to the landlord; West v. Hedges (b); Henchett v. Kimpson (c); but such bill of sale and receipt will not amount to a removal so as to subject him to an In the case of growing crops, possibly the sheriff may sell either for a sum of money to be paid immediately, or for a larger sum, to be paid on reaping and removal of the crops; and in the latter case, he could not be called upon by the landlord, by motion, to pay his rent until the time came for removal of the crops. The landlord is in no way injured by this, for if there had been no execution, and he had distrained the crops for his rent under 11 Geo. 2, c. 14, s. 8, he could not sell them till they were reaped, and must, therefore, wait for his money till that time. There seems, therefore, to be no reason why he should be held to be authorized by the statute of Anne to do that which at common law he could not do, namely, to distrain goods in custodiâ legis; but rather that that act intended to give him protection through the liability of the sheriff, in lieu of his right of distress, which is taken away by the seizure under a fieri facias. This appears to be the reasonable construction of the statute of Anne in regard to goods of any kind seized by the sheriff; and it is more strongly so in regard to growing crops, which, although liable to be taken in execution by the common law, were not liable to be distrained for rent until the statute 11 Geo. 2.

It is true that in the case of Smallman v. Pollard there are dicta of the learned Judges, especially of Mr. Justice Maule, intimating their opinion, that by the statute of Anne the landlord's right to distrain is preserved; but those dicta are entirely beside the point on which the case was de-

WHARTON and Another
NAYLOR and Another.

⁽a) 6 M. & G. 1001.

⁽b) Barnes, 211.

⁽c) 2 Wils. 140.

WHARTON and Another v. NayLor and Another.

termined, which was simply that the declaration against the sheriff alleged a removal of the goods, (which allegation Mr. Justice Cresswell considered to be necessary), and the fact of removal was not established by proof of a bill of sale, the goods remaining on the premises. With all possible respect towards the learned Judges whose dicta are there stated, we cannot agree with them in opinion. We think that the crops in question having been lawfully seized by the sheriff (for, not having been removed at the time of the trespass complained of, the seizure of them had not been rendered unlawful), were in custodiâ legis, though in the hands of the plaintiffs, the vendees, under a bill of sale from the sheriff, and could not by law be distrained for any We think that the statute of Anne does not preserve any right in the landlord so to distrain, but gives him his remedy against the sheriff in lieu of such right, and that our judgment must, therefore, be for the plaintiffs.

Judgment for the Plaintiffs.

In re ANGELL, Gent., One, &c.

An attorney's bill of costs having been referred to taxation, certain items were objected to before the Master, on the ground that the attorney at the time those items were incurred, was uncertificated; and the Master accordingly disallowed

HUDDLESTON moved for a rule to shew cause why the Master should not review his taxation (a).

It appeared that Mr. Angell's bills of fees had been referred by a Judge's order, by consent, to taxation. At the taxation it was objected, that, during part of the time over which the charges extended, Mr. Angell had not obtained a stamp certificate. The Master had thereupon disallowed various charges, amounting to a sum of six

(a) He also moved to set aside the Judge's order referring the bills to taxation, and rule of Court thereon, but upon other grounds.

them: Held, that the Master acted rightly in disallowing the items, and that it was no ground for reviewing the taxation.

pounds, for business done between the 15th of November, 1847, and the 23rd of December in the same year, being the time during which Mr. Angell was uncertificated. That Mr. Angell had protested against the Master's power to enter into the question whether he was certificated or not.

In re

Huddleston contended, that the Master had no power to entertain the objection that the attorney was uncertificated. In Evans v. Taylor (a) it was held, that the Master, to whom a bill of costs is referred for taxation, has no power to inquire into the fact whether the business charged for was agreed to be done for costs out of pocket. And in Matchett v. Parkes (b), it was held, that on taxation of an attorney's bill, the Master had no jurisdiction to disallow items on the ground that, in respect of the business to which they refer, the attorney was guilty of negligence. He referred also to 1 Chit. Archb. Pract. 96, 8th edit.

Coleridge, J.—The objection on the ground of negligence is very different from that of the want of a certificate. The question of whether there has been negligence or not may be a fit one for discussion. But whether the attorney has or has not obtained his certificate, is a simple fact upon which there can scarcely arise any dispute. The Master asks, "Had you a certificate at the time this business was done?" The attorney answers, "No." The Master then refers to the act of Parliament, the 6 & 7 Vict. c. 73, s. 26, which enacts, that "no person who as an attorney," &c., "shall sue," &c., "without having previously obtained a stamped certificate which shall be then in force, shall be capable of maintaining any action," &c., "for the recovery of any fee," &c., "for or in respect of any business, matter, or

⁽a) 2 Dowl. 349.

⁽b) 9 M. & W. 767; S. C. 1 Dowl. 924, N. S.

In re

thing done by him as an attorney," &c., "as aforesaid, whilst he shall have been without such certificate as last aforesaid." Is he then to go through the mockery of taxing items which he sees the attorney is not entitled to recover? I think he is justified in taking notice, where such is the case, that the attorney has not a certificate; and this, I understand, has been the usual practice adopted. There will, therefore, be no rule.

Rule refused.

GILES and Others v. GROVES.

(In the full Court.)

Case for disturbance of an ancient ferry from A. to B. and back again. The defendant pleaded that the plaintiffs were not possessed, &c., and that there was no such ancient ferry, &c. At the trial the plaintiffs proved the right to, but not from B. Held, that the plaintiffs were entitled to a verdict as to such part as they proved, and that Reg. Gen., Hil.

For that the plaintiffs, before and at the time, &c., were, and from thence hitherto have been and still are possessed, to wit, as trustees for the Society of Free Watermen of the River Thames residing at Greenwich, in the county of Kent, called the Isle of Dogs Ferry Society, of an ancient ferry, called Potter's Ferry, for foot passengers and goods belonging to such foot passengers, across the river Thames, to and from a certain place in the Isle of Dogs, in the parish of St. Dunstan Stebonheath, otherwise Stepney, in the county of Middlesex, from and to Greenwich, in the county of Kent, taking for the carriage and conveyance of such passengers and their goods over and across such ferry, in any boat or boats kept by or by the authority of them, the plaintiffs, for that purpose, certain reasonable freights or ferryages in that behalf due and of right payable. Nevertheless, the defendant, well knowing

Term, 4 Wm. 4, tit. "Tresp." r. 6, applied to actions on the case as well as to actions of trespass; and that it made no difference whether the plaintiffs claimed as owners of a franchise, or by virtue of an easement.

the premises, and wrongfully contriving to disturb and injure the plaintiffs in the peaceable and lawful enjoyment of their said ferry, to wit, on, &c., and on divers other days and times, &c., wrongfully, injuriously, and unlawfully obstructed, disturbed, and interrupted the plaintiffs, their servants, and labourers, in the use and enjoyment of their said ferry and passage, and hindered and prevented them from carrying divers foot passengers for hire over and across the said river Thames, &c. By reason whereof the said plaintiffs have been deprived of large profits, and have been and are greatly injured, &c., in the possession thereof, and their rights and title thereto. To the plaintiffs' damage, &c.

Pleas. First. That the plaintiffs were not possessed of the ancient ferry in the declaration mentioned, modo et formâ, &c. Secondly. That there was not, at the said several times when, &c., in the declaration mentioned, or either of them, such ancient ferry as in the declaration mentioned, modo et formâ.

Replications, joining issue on the above traverses.

At the trial, which took place at the Kent Summer Assizes, 1847, before Parke, B., the defendant's counsel, at the close of the plaintiffs' case, objected that they must be nonsuited, as the evidence did not support the claim as laid. He then called witnesses on behalf of the defendant, who proved that the only right of ferry was from Greenwich to the Isle of Dogs, but not back again. The jury found the right of ferry from Greenwich to the Isle of Dogs, but negatived any right to the ferry back. The learned Baron directed a verdict for the plaintiffs for so much of the right as was proved, damages 1s., with liberty to the defendant to move to enter a nonsuit, if the Court should be of opinion that the declaration was not distributable.

A rule nisi having been accordingly obtained,

Channell, Serjt., and Pigott, shewed cause.

L 2

GILES and Others

GILES and Others v. GROVES.

Montagu Chambers, Peacock, and Baddeley, in support of the rule.

The following authorities were referred to. Reg. Gen., Hil. Term, 4 Wm. 4, tit. "Trespass," r. 6 (a); Kingsmill v. Bull (b); 2 Wms. Saund. 175 l, 6th edit.; Higham v. Rabett (c); Ivatt v. Mann (d); Knight v. Woore (e); Morewood v. Wood (f); Anderson v. Chapman (g); Ricketts v. Salwey (h); Tapley v. Wainwright (i); Pythian v. White (k); Pim v. Curell (l); Bailey v. Appleyard (m); Beadsworth v. Torkington (u); Churchman v. Tunstal (o); Prudhomme v. Fraser (p); Doe d. Bowman v. Lewis (q).

Cur. adv. vult.

Lord Denman, C. J., subsequently (r) delivered the judgment of the Court (s).

For the matter now in dispute, the case was shortly this: the plaintiffs claimed a right of ferry from Greenwich to the Isle of Dogs and back again, and they proved half what they claimed,—the right to, but not from, the Isle of Dogs. The defendant admitted by his pleading that he

- (a) "In all actions in which such right of way or common as aforesaid, or other similar right, is so pleaded, that the allegations as to the extent of the right are capable of being construed distributively, they shall be taken distributively."
 - (b) 9 East, 185.
- (c) 5 Bing. N. C. 622; S. C. 7 Dowl. 653; 7 Scott, 827.
- (d) 4 Scott, N. R. 342; S. C. 3 M. & G. 691.
- (e) 3 Bing. N. C. 3; S. C. 5 Dowl. 201; 3 Scott, 326. (f) 4 T. R. 157.
- (g) 5 M. & W. 483; S. C. 7 Dowl. 822.

- (h) 2 B. & A. 360; S. C. 1 Chitt. 104.
- (i) 5 B. & Ad. 395; S. C. 2 N. & M. 697.
- (k) 1 M. & W. 216; S. C. 4 Dowl. 714.
 - (1) 6 M. & W. 234.
- (m) 8 A. & E. 161; S. C. 3 N. & P. 257.
 - (n) 1 Q. B. 782.
 - (o) Hardr. 163.
- (p) 2 A. & E. 645; S. C. 4 N. & M. 512.
- (q) 13 M. & W. 241; ante, vol. 2, p. 667.
 - (r) In Trinity Vacation.
- (s) Lord Denman, C. J., Patteson, J., Coleridge, J., and Brle, J.

had invaded the right claimed, supposing such a right in fact, but there was nothing to shew which part of that entire right he had invaded. Hence the plaintiffs claimed a verdict on the only issues on the record, viz., on not possessed, and on the existence of the ancient and entire right of ferry. It appears to us, that in admitting the invasion of the right as stated, that right being on the face of it divisible, he, the defendant, must be taken to have admitted it as to each part which would entitle the plaintiffs to a verdict, and we think the plaintiffs may succeed as to any distinct part which they prove. The new rule cited strictly applies in actions on the case as well as in actions of trespass; and for this purpose we cannot see any reason for difference where the plaintiffs claim as owners of a franchise or by virtue of an easement.

GILES and Others v. GROVES.

Rule discharged.

McDowall v. Boyd.

THIS was a rule, calling upon the defendant to shew cause why the plaintiff should not be at liberty to enter up judgment non obstante veredicto, or why a repleader should not be granted.

A plea of delivery and receipt of a bill of exchange "for any on account of the plaintiff should not be granted.

The declaration was in debt, and contained two counts. The first was a count by the drawer against the acceptor of a bill of exchange. The second upon an account stated.

Pleas. First. That the bill of exchange, after the acceptance, was altered in a material point. Second. That the acceptance of the bill of exchange was the account stated in the second count, and that the debt was the same.

Replication. First, a traverse of the alteration, and second, a new assignment as to the account stated.

Rejoinder. First, as to the traverse of the alteration, joining issue. Secondly, as to the new assignment the defendant pleaded, first, never indebted; and secondly, as

A plea of delivery and receipt of a bill of exchange "for and on account of, and in payment and discharge of, the said debt," &c., "and the said causes of action in respect thereof," is a plea in suspension only, and not in extinguishment of the debt. McDowall b. Boyd.

to the said several causes of action by the plaintiff above newly assigned as to the plea of the defendant by him lastly above pleaded, that after the accruing of the said debt of 521. 10s. upon the said account stated above newly assigned, and the causes of action in respect thereof, and before the commencement of this suit, to wit, on the 15th day of June, A. D. 1847, the plaintiff made and drew his certain bill of exchange in writing, bearing date, to wit, the day and year last aforesaid, and thereby then required the defendant, four months after the date thereof, to pay to the order of the plaintiff a certain sum, to wit, the sum of 52L 10s., for value received; and the defendant then accepted the last mentioned bill, and then and before the commencement of this suit, to wit, on the day and year last aforesaid, delivered the same to the plaintiff, who then took and received the same of and from the defendant for and on account of, and in payment and discharge of the said debt of 521. 10s., so accrued upon the said account stated above newly assigned as aforesaid, and the said causes of action in respect thereof. That the said last mentioned bill of exchange, after the same had been fully drawn and dated as lastly above mentioned, and before the commencement of this suit, to wit, on the said 15th day of June, A. D. 1847, was accepted by the defendant in the words and in manner following, that is to say, by the defendant writing across the said last mentioned bill the words, "Accepted, John Boyd." That after the said drawing and accepting thereof, and after the same was completely issued and negotiated, to wit, by the defendant as such negotiator as aforesaid, and during the currency thereof, and before the commencement of this suit, to wit, on the 20th day of June, 1847, the plaintiff, without the consent of the defendant, altered and changed the last mentioned bill in a material part, by adding to the defendant's said acceptance of the last mentioned bill so made and drawn in manner and form as last aforesaid, in writing on the said bill, the additional words following, to wit, "Payable at the Joint Stock Bank, London," such last mentioned words falsely purporting to be part and parcel of the acceptance of the said last mentioned bill; and that the said alteration was not made in correction of any mistake originally made in the framing of the said last mentioned bill, or to further the first intentions of the parties thereto, or any of them. Verification.

McDowall Boyd.

Replications. As to the first plea to the new assignment, joining issue. As to the second plea, that he, the plaintiff, did not alter or change the said bill in that plea mentioned, in manner and form, &c. Upon which issue was joined.

At the trial at the sittings in the present Term, before Wightman, J., a verdict was found for the plaintiff on the general issue (a), and for the defendant as to the rest of the issues.

T. Browne shewed cause. The question is, whether the averment that another bill was delivered and received, "for and on account of, and in payment and discharge of the said debt of 521 10s., &c., "and the said causes of action in respect thereof," is a plea by way of extinguishment, or of suspension only of the debt; and it is submitted that the former is its true effect. It may be admitted, that if the plea had only stated that the bill was given "for and on account of" the debt, it would merely have shewn, according to decided cases, of which Kearslake v. Morgan (b) is one of the earliest, a suspension of the debt; and the subsequent portion of the plea would then have rendered it bad. But here it goes on to say, "and in payment and discharge;" and these words, it is submitted, are equivalent to "in satisfaction and discharge," which, according to several cases, have been held sufficient. It is true that in Maillard v. Duke of Argyll (c), the words were, "for and on account of," &c.,

⁽a) A mistake had occurred at the trial in entering up the verdict, but the case was argued as if it were rightly entered.

⁽b) 5 T. R. 513.

⁽c) Ante, vol. 1, p. 536; S. C. 6 Scott, N. R. 938; 6 M. & G. 40.

McDowall v. Boyp.

"and in payment thereof," and the Court seemed to think that the word "payment" did not amount to "satisfaction." Here, however, the word "discharge" is added. plaintiff will no doubt rely on the case of Emblin v. Dartnell (a), as shewing that "discharge" does not amount to "satisfaction." In that case the defendant had pleaded to an action of assumpsit on an account stated, that after the statement of the account the plaintiff drew, and the defendant accepted, a bill of exchange, and delivered the same to the plaintiff, who then accepted and received the same "in discharge of" the said sum, and indorsed the bill to a certain person unknown to the defendant, who was the holder thereof, and entitled to sue the defendant on the same, and the plaintiff had replied, that he did not accept and receive the bill "in satisfaction and discharge" of the said sum; and the Court held, on special demurrer, that the replication was bad, as traversing more than was alleged by the plea. Parke, B., however, in that case, observed, that "in discharge" "means 'for and on account,' and perhaps something more." Besides the words here are, "in payment and discharge of," the true effect of which is an extinguishment of the debt. He referred to Sibree v. Tripp (b).

O'Malley, in support of the rule, was not called upon.

WIGHTMAN, J.—It has been very properly admitted in this case, that if the words in the plea had been only "for and on account of," the subsequent part of the plea would have rendered the plea bad; for it would appear that the bill was given as a collateral security, which would suspend the cause of action whilst running, but could have no effect when the collateral security failed, and the original liability revived. The defendant's counsel, however, contends, that the words here used are equivalent to "satisfaction," and that therefore the plea in effect states an extinguishment of

the plaintiff's cause of action. It is a pity, if it was so meant, that the word "satisfaction," which the law knows, was not used. I am always inclined to distrust supposed equivalents. It is plain that if the words "in payment and discharge of" do not amount to "satisfaction," these words are not rendered stronger by the insertion of the words "for and on account of."

McDowall v. Boyd.

Two cases have been cited: Maillard v. The Duke of Argyll (a), where the Court thought that the words "in payment thereof" were not equivalent to "in satisfaction and payment;" and Emblin v. Dartnell (b), where the words "in discharge of" were held not to amount to "in satisfaction of;" for it was on the sole ground that the replication traversed more than was alleged in the plea, that the Court, in the latter case, pronounced in favour of the defendant. I entirely concur in both those decisions. Whatever may be the ordinary meaning of the words "payment in discharge of," I am of opinion that their legal meaning does not amount to "satisfaction."

Rule absolute for judgment non obstante veredicto (c).

- (a) Ante, vol. 1, p. 536.
- (b) Ibid. p. 591.
- (c) The rule was drawn up:—
 "To enter up judgment for the
 plaintiff on the new assignment
 for the sum of 52l. 10s. on the

second count, and new assignment mentioned, notwithstanding the verdict found for the defendant on the issue joined upon the second plea to the said new assignment."

1848.

In re Wood, Gent., One, &c.

Affidavits in support of a motion to compel an attorney to pay over money which he has received as attorney in a cause, may be entitled "in the matter of the attorney," and need not be entitled in the cause.

A RULE had been obtained in Easter Term last, calling upon one Wood, an attorney of this Court, to shew cause why he should not pay over to his client, a Mr. Randall, a sum of money which he had received under the following circumstances. It appeared that Mr. Randall's goods having been irregularly seized by the sheriff of Middlesex, he instructed Wood, as his attorney, to bring an action for the seizure. An action was accordingly commenced, which was subsequently compromised for a sum of 69*l.*, and costs, which was paid to Mr. Wood as the attorney of the plaintiff. The present rule had been obtained on an affidavit entitled "In the Matter of —— Wood, Gent., One," &c.

Hawkins now shewed cause. The affidavit is wrongly entitled "in the matter of" the attorney. There is a cause in Court, in which the money in question was received; and the general rule is, that where a motion is made relating to a cause in Court, the affidavits should be entitled In Doe d. Clarke v. Stillwell (a), it was held, in the cause. that the affidavit of the execution of a power of attorney to demand the performance of an award upon an order of reference of a cause, should be entitled in the cause. [Wightman, J.—There the motion was a proceeding in the cause]. In Simes v. Gibbs (b), affidavits in support of an application against an attorney, to compel him to deliver up a document, were held to be properly entitled in the action out of which the claim arose, although judgment had been signed and execution issued. | Wightman, J.— There the objection was, that they ought to have been entitled in the matter of the attorney]. There cannot be two ways of entitling the affidavits. Stephens v. Hill (c) is

⁽a) 6 Dowl. 305.

⁽c) 10 M. & W. 28; S. C. 1 Dowl, 669, N. S.

⁽b) Ibid. 310.

an authority to the same effect. There it was held that the affidavits, to ground an application to strike an attorney off the roll for misconduct in the cause, might be entitled in the cause, though judgment has been obtained in it. [Wightman, J.—Surely the affidavits in that case might have been entitled in the matter of the attorney].

In re Wood.

Sir F. Thesiger, in support of the rule, was not called upon.

WIGHTMAN, J.—The Master (a) informs me that in a case of In re Macey (b), in the full Court, where the application was to strike an attorney off the roll for having offered a sum of money to a witness, in a cause in which he was attorney, to keep out of the way and refrain from giving evidence, the affidavits were similarly entitled (c). Suppose, in the present instance, the action in which the money was received had been brought in the Common Pleas, then the name of the cause could scarcely be the proper title; and yet, if he were an attorney of this Court, the motion might properly be made here. The objection therefore fails, and the rule must be made absolute.

Rule absolute.

(a) Master Bunce.

(b) Trinity Term, 1847. See the case referred to on another point, aute, vol. 5, p. 276, n. (b).

(c) On referring, however, to

the affidavits, it will be found that they were entitled in the cause also, as well as in the matter of the attorney. 1848.

CHRISTMAS v. EICKE.

Actual personal service of the writ of summons must be effected in order to obtain leave to enter an appearance for the defendant, sec. stat.

C. WORDSWORTH moved for leave to enter an appearance for the defendant, sec. stat. upon an affidavit of service, which disclosed the following facts. Several calls had been made by the party endeavouring to serve the writ of summons at the residence of the defendant, without On the last occasion, having inquired if the defendant was at home, and having received an evasive answer, he waited in the hall. Having afterwards gone into the parlour for a few minutes, he saw the defendant running up the stairs. He immediately followed after him, but before he could give him a copy of the writ, the defendant went into a room and fastened the door. He then called out to him and told him that he had a writ against him at the suit of the plaintiff, and putting a copy of it through a crevice of the door, told him that that was the copy of the writ. It is submitted that this is a constructive service, and that it is not necessary that the copy of the writ should be actually forced into the defendant's It is sufficient if it is laid down before him, and he refuses to touch it or take it up.

WIGHTMAN, J.—In Goggs v. Lord Huntingtower (a), the Court of Exchequer held that there must be in all cases an actual personal service, in order to obtain leave to enter an appearance, and that case has been since acted on in this Court. Here the service is merely constructive. I think it better to adhere to the strict rule that actual personal service should be required. I cannot, therefore, allow an appearance to be entered, but you may have a distringas to compel an appearance.

Rule accordingly.

(a) Ante, vol. 1, p. 599; S. C. 12 M. & W. 503. See also Heath v. White, ante, vol. 2, p. 40, and

Walton v. The Universal Salvage Company, ante, vol. 4, p. 558.

1848.

PITTS v. STEPHENS.

(In the full Court.)

THIS was a rule calling upon the plaintiff to shew cause Notice of an why the verdict in this cause should not be set aside, and a new trial had, on the ground of misdirection at the trial.

It appeared that the above action on the case had been attorney brought against the sheriff of Berks for neglect in executing a writ of fi. fa. at the suit of the plaintiff, against certain persons, until after the lapse of a reasonable time, and until after the plaintiff had received notice of an act of the conduct of bankruptcy committed by the said parties, whereby the plaintiff was deprived of the fruits of his execution. the trial, it appeared that the sheriff had not been guilty of delay, if a notice of the act of bankruptcy served on a cution out of clerk of the plaintiff's attorney issuing the writ of execution, the protection of that section. such clerk not being shewn to have had personally the conduct of the suit, operated to take the execution out of the protection of the 2 & 3 Vict. c. 29, s. 1; but that he had been guilty of delay, if it did not so operate. ridge, J., before whom the cause was tried at the Gloucestershire Summer Assizes, 1847, told the jury that the notice only operated from the time when it was communicated to the attorney by his clerk, and the jury thereupon having found a verdict for the plaintiff, the above rule was obtained for this alleged misdirection (a), against which

ruptcy served on a clerk of the plaintiff's issuing the writ of exccution, such clerk not being shewn to have had personally the suit, is not a sufficient notice under the 2 & 3 Vict. c. 29, s. 1, to take the exe-

Talfourd, Serjt., and Gray, shewed cause.

H. S. Keating, and H. J. Hodgson, were heard in support of the rule.

(a) The rule was also obtained on affidavits, and was argued upon them after the judgment given as here reported; and the rule was ultimately discharged.

PITTS
v.
STEPHENS.

The following authorities were referred to in the course of the argument. Stat. 2 & 3 Vict. c. 29, s. 1; Rothwell v. Timbrell (a); Ramsey v. Eaton (b); Lackington v. Elliott (c); Grant v. Mackenzie (d); Conway v. Nall (e); Bird v. Bass (f).

Cur. adv. vult.

The judgment of the Court (g) was now delivered by Lord Denman, C. J.—The point which has been argued in this case, and on which we think it right to pronounce our judgment before we go into the remaining questions, arises on the first proviso in the 2 & 3 Vict. c. 29, s. 1.

That section enacts, "that all contracts, dealings, and transactions, by and with any bankrupt, really and bonâ fide made and entered into before the date and issuing of the fiat against him, and all executions and attachments against the lands and tenements, or goods and chattels of such bankrupt, bonâ fide executed or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; provided the person or persons so dealing with such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not at the time of such contract, dealing or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed."

Upon these words the question is, whether a notice in other respects treated as sufficient, but served on a clerk of the plaintiff's attorney issuing the writ of execution, such clerk not being shewn to have had personally the conduct

```
(a) 1 Dowl. 778, N. S.
(b) 10 M. & W. 22; S. C.
2 Dowl. 219, N. S.
(c) 8 Scott, N. R. 275; S. C.
7 M. & G. 538.
(d) Ante, vol. 5, p. 129; S. C.

1 Exch. 12.
(e) 1 C. B. 643.
(f) 6 M. & G. 143; S. C. 6
Scott, N. R. 928.
(g) Lord Denman, C. J., Patteson, J., Coleridge, J., and Erle, J.
```

of the suit, will take the execution out of the protection of the clause. 'The learned Judge ruled that it would not.

In deciding this question, it is important, of course, to consider the object of the proviso, which is in restraint of the previous enactment, and that is clearly this: whereas dealings with a trader bonâ fide carried on, or executions issued out against his property in ignorance of a prior act of bankruptcy, and prior to the date of the fiat are to be protected, nothing is to be done to relieve from the ordinary operation of the bankrupt law any transaction entered into, or any execution levied with notice of such act. advancement of this, a second proviso further limits the operation of the enacting part of the section, by providing, that even where there is no such notice, still if the payment by the bankrupt be in the way of fraudulent preference, the act shall give no protection. On the receipt of the notice, it becomes the duty of the person properly served to stop the transaction or execution, as the case may be.

This then being the object of the proviso, the notice must be understood to be such as will advance it, and, therefore, in the case of an execution it has been held, rightly we think, in Rothwell v. Timbrell (a), that although the words are "the person or persons" "at whose suit or on whose account" the execution issues, yet notice to the attorney who conducts the cause for him, when acting in the cause, is sufficient. It is obvious that notice to him will, in the majority of such cases, be more effectual to stop promptly the further proceedings, than notice to the client And it would be easy to suppose cases where the clerk of the attorney may have been so entirely entrusted with the management of the cause, and the control of the proceedings, that notice to him might be as effectual as to his principal, and equally bind the client. And so in the case of contracts, dealings, and other transactions in business, instances might be put of confidential clerks or managers PITTS
v.
STEPHENS.

PITTS
v.
STEPHENS.

invested with such authority in the management of their masters' affairs, or so trusted in the particular negotiation, that a notice to them ought to stop at once the further progress of it, and, therefore, would bind the principal as a notice to himself. The statute in terms requires that the person dealing or suing should have notice, not that he should be personally served; and wherever in the transaction or the suit he has put, or allowed to be put, some one else in his place to manage or contract, in good sense and equity a notice to that person must be considered a notice to himself.

This being the principle, the question is, whether such a clerk as we have described from the evidence in the cause. falls within it. The counsel for the defendant contended that it did; that any clerk at the office of the attorney, the place where all notices in the cause were to be served, was such clerk; nay, that any other person at any other place, to whom, or at which, by notice over his door, the attorney might direct papers, letters, or notices in a cause to be delivered, was such an agent as might receive a notice under the proviso to bind the client. But there is an obvious distinction between such a notice and those notices and matters which, in the ordinary progress of a cause, must be passing from one attorney to the other. That the cause may proceed with regularity and without delay, the Courts require that the attorney shall always be at his office, or have some competent person there during office hours, for the purpose of receiving them; and as to these, the attorney is regarded not merely as the mere agent of the client, but rather as a substituted principal. What is required upon a notice of this kind to be done or communicated, there ought to be a clerk at the office sufficiently skilled and entrusted to be able to do or communicate, or take the necessary steps upon, if the attorney himself be absent; and the client must suffer if his attorney be guilty of any default in not employing such a clerk. notice now in question was not a notice in the cause; it

was the intervention of a third party, on the result of which would depend the perception or not of the whole fruits of the cause. It cannot be said that the clerk receiving it had authority to stay the issuing or the bringing of the execution, nor that his master was bound at all office hours to have a clerk there with such authority in his own absence. This was a matter which would require the whole discretion of the principal to determine whether he would yield to it or enforce his writ, and attorneys are not bound in all cases to have in their employment clerks to whom such extensive authority may be safely entrusted. What has been called a managing clerk is by no means a necessary officer in an attorney's establishment; it would be very unjust to require it; and it must not be taken that even such a person would, under all circumstances, be one on whom such a notice could be effectually served.

If it be said that the doctrine now laid down may sometimes lead to injustice, and that by the absence of the attorney from his office it may become impossible to serve the notice in time to prevent the execution from taking effect, the answer is, that the proviso embraces other cases than that of an execution, and must be construed throughout on the same principle; that, even as construed by us, the party seeking to prevent the operation of execution has unavoidably an advantage over him who seeks to invalidate a mercantile transaction, because he has in all cases both the client and attorney, on either of whom he may serve the notice, as may be most convenient; but lastly, and chiefly, that the statute is framed in advancement of the policy of modern legislation to restrain the relation to the act of bankruptcy, and that we ought to be careful not to limit that by a notice, which is in truth merely nugatory as regards the object with which it is professed to be served. The words compel us to hold that where the notice is served on a proper person before the execution levied, it must have effect, even where from distance it cannot be used to stop it; but we ought not to go beyond that.

VOL. VI. M D. & L.

PITTS

v.

STEPHENS

PIFTS v.
STEPHENS.

We think, therefore, that in this case, having regard to the exact circumstances, the ruling of the learned Judge was right; and it is clear that the party serving the notice treated the clerk merely as a channel through which it was to reach the attorney, and never intended to rely on the service on him as in itself good service.

Rule discharged.

REGINA v. The Governors and Guardians of the Poor of the Parish of St. Mary, Newington.

A local act (54 Geo. 3, c. exiii. s. 3), enacted, that at a vestry meeting to be held on Easter Tuesday in

THIS was a rule, calling upon the churchwardens and overseers of the poor of the parish of St. Mary, Newington, in the county of Surrey, and the governors and guardians of the poor of the said parish, to shew cause why a writ of

revery year, all the vacancies in the list of governors and guardians of the poor should "be filled up by poll or ballot, or in such way of election as should be deemed most proper and convenient." At a vestry meeting held accordingly, the mode of election pursued was as follows: Two candidates were proposed for each vacancy; on a show of hands being taken, the one, in whose favour it appeared to be, was declared elected; and then two other candidates were proposed for the next vacancy; and so on, till all the vacancies were filled up. One of the rejected candidates demanded a poll of the inhabitants of the parish, which was refused by the chairman, who proceeded to complete the elections according to the mode above described.

Held, that this mode of election could not be sustained.

Held also, that it was the meeting itself, and not the chairman, which was to pronounce what was the "most proper and convenient" mode of election; the right to determine the mode of election being limited to a choice among such modes as might best fulfil the object of the section, which was to secure the filling up of the vacancies by a real election made by the inhabitants in vestry assembled.

The 3rd section of the local act requires a vestry meeting to be called on Easter Tuesday in every year, "at which said vestry meeting" the vacancies in the list of governors and guardians of the poor are to be filled up: and "the inhabitants in vestry assembled in such manner, and at such time, as aforesaid, are to nominate and choose" certain persons to be governors and guardians in the room of those resigning: Held, that these provisions were not strong enough to control the general rule of law which requires the poll to be of the parish generally.

By the 2nd section of the 54 Geo. 3, c. cxiii., certain persons ex officio, and certain others named, are appointed governors and guardians of the poor. By the 3rd section, provision is made for the supply of vacancies occurring between Easter and Easter. This is to be done by the remaining or continuing governors and guardians who are to call a vestry meeting

By the 2nd section of the 54 Geo. 3, c. cxiii., certain persons ex officio, and certain others named, are appointed governors and guardians of the poor. By the 3rd section, provision is made for the supply of vacancies occurring between Easter and Easter. This is to be done by the remaining or continuing governors and guardians, who are to call a vestry meeting of the inhabitants of the parish on Easter Tuesday, at which the elections are to be made, "provided always, that after the expiration of one year from Easter Tuesday next after passing this act, it shall and may be lawful for the inhabitants of the said parish in vestry assembled, in such manner and at such time as aforesaid, also to nominate and choose twelve persons," &c. Held, that the words "assembled in such manner" mean, among other things, assembled by virtue of a summons from the governors and guardians; and that therefore a rule for a mandamus to call a vestry meeting for the purpose of proceeding to such election, was properly directed to the governors and guardians, notwithstanding the 58 Geo. 3, c. 69, s. 1, and I Vict. c. 45, s. 3.

mandamus should not issue, directed to the said church-wardens and overseers, or to the said governors and guardians, commanding the said churchwardens and overseers, or the said governors and guardians, to call a vestry meeting of the inhabitants of the said parish, to fill up the vacancies in the list of governors and guardians of the poor of the said parish for the present year, and to nominate and choose a sufficient number of persons to complete the said list, pursuant to the provisions of the statute 54 Geo. 3, c. cxiii.

The facts, as they appeared upon the affidavits, were shortly these. By a local act of Parliament, 54 Geo. 3, c. cxiii, s. 3, twelve of the governors and guardians of the poor of the parish of St. Mary, Newington, were to go out by rotation every year; and at a vestry meeting of the parish, to be holden on Easter Tuesday in every year, the vacancies were to be filled up "by poll or ballot, or in such way of election as should be deemed most proper and convenient." A vestry meeting of the parish had been held on Easter Tuesday, in the present year, for the purpose of filling up vacancies in the list of governors and guardians of the poor of the said parish, and of choosing twelve other governors and guardians in the stead of twelve who then went out. At that meeting, seven persons were elected governors and guardians without a demand of poll. mode of election pursued was as follows:—a candidate was proposed and seconded, then an amendment was moved and seconded of a second name. The amendment was first put to the vestry, and a show of hands taken for and against such amendment; and if the amendment was carried, it was then put as an original motion; and if the amendment were rejected, the original motion was then put. fresh candidate was then proposed, and the same course followed, till all the vacancies were filled. Certain persons having been elected upon a show of hands, in the manner above stated, a poll of the parish was demanded on behalf

REGINA

Governors of
St. Mary,
Newington.

REGINA

5.
Governors of St. Mary,
Newington.

of the unsuccessful candidates in each case, and refused by the chairman, who, although stating his feelings to be in favour of a poll, said that not being aware of any precedent in favour of such a course, he did not feel himself justified in departing from the usual custom. It appeared, from search made in the minutes of all the vestries of the parish held since the passing the 54 Geo. 3, c. cxiii., that no instance was to be found in which a vestry had been adjourned for the purpose of taking a poll of the parish for the election of governors and guardians, although the election of such officers had been more than once contested. It was not shewn that any formal demand had been made to the chairman to take the sense of the vestry meeting assembled as to what was the most proper and convenient mode of election.

Talfourd, Serjt., on behalf of the churchwardens and overseers of the poor of the parish shewed cause (a). The churchwardens and overseers only desire to properly discharge the duty imposed upon them by law. The simple question is whether, under the local act 54 Geo. 3, c. cxiii., a party dissatisfied with the return on a show of hands, has a right to have a poll of the parish. The 54 Geo. 3, c. cxiii., s. 3 (b), enacts, that "it shall be lawful for the said

- (a) In Easter Term.
- (b) The following are the material sections of this act:—

54 Geo. 3, c. cxiii. s. 3. "That whenever any vacancy of the said governors and guardians shall arise, by death, removal, resignation, disqualification, refusal, or neglect, or have been rendered incapable of acting in the powers and authorities by this act reposed in them, that then and in every such case it shall and may be lawful to and for the remaining or continuing governors and

guardians to supply such vacancies until the election of governors and guardians at the then ensuing Easter, when it shall be lawful for the said governors and guardians to call a vestry meeting of the inhabitants of the said parish, on the Easter Tuesday in every year; at which said vestry meeting all the vacancies in the list of governors and guardians shall be filled up by poll or ballot, or in such way of election as shall be deemed most proper and convenient: provided always,

governors and guardians to call a vestry meeting of the inhabitants of the said parish on the Easter Tuesday in every year; at which said vestry meeting all the vacancies

REGINA

Governors of
St. Mary,
Newington.

that after the expiration of one year from Easter Tuesday next after the passing of this act, it shall and may be lawful for the inhabitants of the said parish, in vestry assembled, in such manner and at such time as aforesaid. also to nominate and choose twelve persons in the room or stead of twelve of the old governors and guardians who are hereby required and directed yearly and every year in succession, according to the priority of their election and appointment, to go out of office, in order that such other twelve persons shall be so chosen annually in their room and stead, in the manner aforesaid: but nothing herein contained shall extend to prevent the inhabitants of the said parish, at such vestry, from re-electing any of those governors and guardians who have retired from office, or any of those who are to go out by rotation," &c.

Sect. 57. "That on the Easter Tuesday next after the passing of this act, and so in like manner on the Easter Tuesday in each and every succeeding year, the inhabitants of the said parish of St. Mary, Newington, in vestry assembled, or the major part of them then present, shall nominate eight substantial householders to serve the office of overseers of the poor of the said parish, and shall cause a list of the names of the said persons to be delivered to the justices of

the peace acting in and for the eastern half hundred of Brixton and borough of Southwark, in the said county of Surrey, at the next ensuing petty session; and the said justices at their said petty session, or any two or more of them, shall and they are hereby authorised and required to nominate and appoint, by writing under their hands and seals, four of the said eight persons named in such list to be overseers of the poor of the said parish: and such four persons so nominated and appointed shall continue in their said office of overseers until the Easter Tuesday following, and until the petty session then next following, when four other persons shall be appointed, in manner aforesaid, to act in their stead; and all such persons when so nominated and appointed, and having notice thereof, shall from thenceforth, together with the churchwardens for the time being of the said parish, be and be deemed overseers of the poor of the said parish of St, Mary, Newington; and the said churchwardens and overseers. and each of them shall, and they are hereby severally required to take upon themselves the office and offices of governors and guardians of the poor of the said parish, and to do, perform, and execute all matters and duties incident to the office of overseer or overseers of the poor, which are not in and by this act vested REGINA

Governors of
St. Mary,
NEWINGTON.

in the list of governors and guardians shall be filled up by poll or ballot, or in such way of election as shall be deemed most proper and convenient." The words "deemed most proper and convenient" must mean, it is submitted, "deemed" by the meeting itself; and if the chairman had been desired to take the sense of the meeting as to which was the most "proper and convenient" course to pursue. the question might have been different. But here no such demand was made. It is not denied that the election by show of hands is an unsatisfactory mode of election (a), but the poll here demanded was not a poll of the vestry meeting, but of the parish at large. It is submitted that the true construction of the local act is, that the election of governors and guardians must be completed at the vestry meeting to be holden on Easter Tuesday; and that, therefore, the only poll which can be demanded must take place at the vestry meeting, and close on that day. There is no power of adjournment given, nor any provision for a poll to be afterwards taken; nor is there anything in the proviso limiting the right of voting to parties who have paid the rates, from which a poll of the parish to be taken on a future day can be implied. Although, therefore, the right to poll may not be confined to the persons actually present at the time when it is demanded, it is submitted that it is restricted to the parties who shall poll at the vestry on the day specified. The 57th section of the local act seems to recognise the inhabitants who choose to meet in vestry, as the parties in whom the election is vested. That section merely directs, as to the appointment of overseers, "that

in other officers or persons; and they and each of them shall, in the execution of their said office of governor, and guardian, and overseer, be subject and liable to the like rules, regulations, restrictions, penalties and forfeitures, and shall have and enjoy the like privileges, exemptions and immunities, as other overseers of the poor are by the laws and statutes of this realm entitled to."

(a) See Campbell v. Maund, 5 A. & E. 865; S. C. 1 N. & P. 558. Reg. v. Churchwardens of St. Pancras, 11 A. & E. 15. on the Easter Tuesday next after the passing of this act, and so in like manner on the Easter Tuesday in each and every succeeding year, the inhabitants," &c. "in vestry assembled, or the major part of them, then present, shall nominate," &c., "to serve the office of overseers." &c. may perhaps be contended, that this act is controlled and altered by the General Vestry Act, 58 Geo. 3, c. 69, s. 3(a), which regulates the manner of voting in vestries; but there is a saving clause in the latter act, sect. 8, which enacts, that nothing in the act contained shall extend "to take away, lessen, prejudice, or affect the powers of any vestry or meeting holden in any parish," &c., "by virtue of any special act or acts," "or to change or affect the right or manner of voting in any vestry or meeting so holden." This is a vestry held by virtue of a special act, and therefore does not come within the general act. The present mode of election is the one that has been continually followed in the parish since the passing of the local act. [He referred to Campbell v. Maund (b).

(a) 58 Geo. 3, c. 69, s. 3. "That in all such vestries every inhabitant present, who shall by the last rate which shall have been made for the relief of the poor, have been assessed and charged upon or in respect of any annual rent, profit, or value, not amounting to fifty pounds, shall have and be entitled to give one vote and no more; and every inhabitant there present, who shall in such last rate have been assessed or charged upon or in respect of any annual rent or rents, profit or value, amounting to fifty pounds or upwards (whether in one or in more than one sum or charge) shall have and be entitled to give one vote for every twenty-five pounds of

annual rent, profit, and value upon or in respect of which he shall have been assessed or charged in such last rate, so nevertheless that no inhabitant shall be entitled to give more than six votes: and in cases where two or more of the inhabitants present shall be jointly rated, each of them shall be entitled to vote according to the proportion and amount which shall be borne by him of the joint charge; and where one only of the persons jointly rated shall attend, he shall be entitled to vote according to and in respect of the whole of the joint charge."

(b) 5 A. & E. 865; S. C. 1 N. & P. 558.

BEGINA

B.

Governors of
St. MARY,
NEWINGTON.

REGINA

B.
Governors of
St. Mary,
Newington.

Collier, on behalf of the governors and guardians of the poor, shewed cause. The writ ought not to be directed to the governors and guardians, but to the churchwardens and overseers, who are the proper officers to summon a vestry. [Coleridge, J.—Does not the third section of the local act say, "that it shall be lawful for the said governors and guardians to call a vestry meeting of the inhabitants of the said parish, on the Easter Tuesday in every year?" It does; but it is submitted that those words do not imperatively cast upon them the duty to do so. They apply to the mode of constituting the vestry the first year after the act passed; and after that time the common law mode must prevail, or the mode pointed out by the subsequent acts relating to vestries. By the 58 Geo. 3, c. 12, s. 4, the churchwardens and overseers are to give notice of vestries to be held for the purpose of establishing select vestries. By the 58 Geo. 3, c. 69, s. 1, it is enacted, that no vestry meeting shall be holden until after notice shall have been given three days at least before the day appointed for holding such vestry, "by the publication of such notice in the parish church or chapel, on some Sunday during or immediately after Divine Service, and by affixing the same, fairly written or printed, on the principal door of such church or chapel." After that act had passed, the governors and guardians, if not the fit parties to give the notice, would have been guilty of the ecclesiastical offence of brawling, if they had attempted to give notice in church; Dawe v. Williams (a). But since the 1 Vict. c. 45, the governors and guardians have no longer the power, if indeed they possessed it before, to give any legal notice. By that act, sect. 1, it is provided, that "no proclamation or other public notice for a vestry meeting, or any other matter, shall be made or given in any church or chapel during or after Divine Service, or at the door of any church

or chapel at the conclusion of Divine Service." Sect. 2 enacts, that notices theretofore usually given during or after Divine Service, &c., shall be affixed to the church doors. And sect. 3 enacts, "that no such notice of holding a vestry shall be affixed on the principal door of such church or chapel, unless the same shall previously have been signed by a churchwarden of the church or chapel, or by the rector, vicar, or curate of such parish, or by an overseer of the poor of such parish," &c. Since that act, the governors and guardians could not give a legal notice, unless they could compel a churchwarden, or the rector, vicar, or curate, or an overseer to sign it. [He referred to Steer's Parish Law, p. 266, 2nd ed.]

Lush, in support of the rule. It is submitted, that it is the common law right of the inhabitants of a parish to have the election of governors and guardians decided by poll, and not by show of hands, if demanded; and that that right cannot be taken away except by express words. The poll should be of the inhabitants generally. The words relied on by the other side as having a contrary effect, are contained in the third section of the local act,--"at which said vestry meeting, all the vacancies," &c., "shall be filled up," &c. There is nothing, however, in these words to limit the proceedings to a particular day. vestry meeting may be adjourned from day to day, and it is still the same vestry meeting. The same observation applies to the 57th section, where the words are, "the inhabitants of the said parish," &c., "in vestry assembled, or the major part of them, then present." The present

mode of election cannot be defended. It may be that onehalf of those who were elected would have been rejected, if the order of competition had been different. If the words "in such way of election as shall be deemed most proper and convenient" be relied on, the sense of the meeting should have been taken whether it was so or

not.

REGINA
9.
Governors of St. Mary,
Newington.

REGINA

Covernors of
St. MABY,
NEWINGTON.

As to the objection that is raised on behalf of the governors and guardians, that they are not the parties to whom the writ ought to be directed, it is submitted that there is nothing in the subsequent acts which have been cited, which shifts the duty of calling the vestry meeting from them to any other persons. Those acts merely change the time and mode of giving notice, and not the parties by whom it is to be given. It has been argued that the local act, in directing the governors and guardians to summon the vestry meeting, only applied to the first year after the act passed; but that construction would leave the words in the third section, "in the manner aforesaid," without any meaning.

Cur. adv. vult.

Colerides, J., now delivered judgment.—This was a rule for a mandamus, to be directed to the governors and guardians of the poor, or to the churchwardens and overseers of the poor of the parish of St. Mary, Newington, calling on them to hold a vestry meeting of the same parish for the purpose of electing certain new governors and guardians in the place of those who had gone out by rotation, or other cause, at or before Easter last. The requisite number had in fact been elected, but by a mode which it was admitted could not in itself be sustained, and the questions raised were, whether that mode had been effectually questioned on the last election,—what was the right mode of election to be pursued for the future,—and as regards the governors and guardians, whether the writ could properly be directed to them?

The parish, as to the regulation of the poor, is under a local act, passed 54 Geo. 3, c. cxiii., by the 3rd section of which it is provided, that at a vestry meeting to be held on Easter Tuesday in every year, all the vacancies in the list of governors and guardians shall be tilled up "by poll or ballot, or in such way of election as shall be deemed most proper and convenient."

Since the passing of the act, the mode of election pursued in case of any contest has been to propose two candidates for each vacancy separately, however many places there might be to be filled up; on a show of hands being taken, the one in whose favour it appeared to be, has been declared elected: and then two other candidates have been proposed for the next vacancy. In this way, on the present occasion, several candidates were elected without objection; but at length, on the rejection of a candidate, he demanded a poll of the inhabitants of the parish, and this was refused by the chairman, who proceeded to complete the elections according to the mode hitherto in use.

It is clear that that mode cannot be sustained, for it does not ascertain the sense of the meeting with regard to all the candidates,—the individual rejected for the first vacancy may have had a greater number of hands held up for him than the successful candidate for the second or any subsequent vacancy, and yet is rejected from all. So again the individual elected to fill the first vacancy, who has only been opposed to one competitor, might have been rejected had he been opposed to all or some of the succeeding competitors. And even if it could be considered, that, on the present occasion, the meeting had decided this to be "the most proper and convenient way of election," (which it would be difficult to hold on the facts stated in these affidavits), yet I think such decision would not have legalized Those general words in the act must receive a reasonable limitation, so as not to defeat the very object of the section, which is to secure the filling up of the vacancies by a real election, made by the inhabitants in vestry assembled; and the right to determine the mode of election is limited to a choice among such modes as may serve that end, as the two specified modes of poll and ballot do. same reason it appears to me, that where many vacancies are to be filled, a show of hands is always an objectionable mode of election: if the candidates are proposed separately,

REGINA

O.

Governors of St. Mary,
NEWINGTON.

REGINA

B.

Governors of St. Mary,
NEWINGTON.

it is morally impossible to preserve accurately in the mind the comparative number of hands raised for each; if they are proposed in lists, the electors have not the opportunity of discriminating between the individuals of the several lists, but must vote for or against the whole of each list, though they might wish to make a selection from all.

What shall be a proper mode of election the statute leaves open to question only on one or two points,—it must be "by poll, ballot, or such way of election as shall be deemed most proper and convenient;" the judgment as to this being limited in the manner I have already pointed out. The party to pronounce that judgment must be the meeting at large, for it is not of common right inherent in the chairman, nor is it given to him by this or any other statute; and he cannot have acquired it by custom.

But whatever the mode of election be, whether poll or ballot, or some other mode determined on by the meeting, the second and remaining question is, who are to be the electors? in other words, must the election be made by those only of the inhabitants present at the commencement of the poll, or at all events arriving during its continuance on that day; or is the poll to continue by reasonable adjournments, so as that the inhabitants generally may vote in the election? It was admitted to be now clearly settled, that the latter was the proper course in general; but the words of the third section of the local act were relied on in support of the former. A vestry meeting is to be called on Easter Tuesday in every year, "at which said vestry meeting" the vacancies are to be filled up. "The inhabitants in vestry assembled, in such manner and at such time as aforesaid, are to nominate and choose." This language does not appear to me strong enough to control the general rule of law, which is founded on reason, and by which alone, in large parishes, it is possible for elections to he made by the majority of those entitled to have a voice in them. The vestry meeting remains the same, however

many times it may be adjourned in consequence of the number of electors. In the general act for the regulation of parish vestries, 58 Geo. 3, c. 69, both in the second and third sections are words that, in a strict literal sense, might seem to restrain the right of interference to those vestrymen who are present when the vestry is first constituted; but they have never been so construed. I think, therefore, that not only was the mode pursued wrong, but that it was properly questioned by the objector, who demanded a poll of the inhabitants generally.

The remaining question, as to the parties to whom the writ is to be directed, depends upon the interpretation to be given to the third section. By the second section, certain persons ex officio, and certain others named, are appointed governors and guardians. By the third, provision is made for the temporary supply of vacancies occurring between Easter and Easter. This is to be done by the remaining or continuing governors and guardians; and these are at Easter to call a vestry meeting of the inhabitants of the parish on Easter Tuesday, at which the elections are to Then follows this proviso: "Provided always, that after the expiration of one year from Easter Tuesday next after passing this act, it shall and may be lawful for the inhabitants of the said parish in vestry assembled, in such manner and at such time as aforesaid, also to nominate and choose twelve persons," &c.

It was contended, that the words "in vestry assembled" were to be separated from those which immediately followed,—that the vestry was, therefore, to be called in the ordinary way, and that the governors and guardians had nothing to do with the calling it. It seems to me a more reasonable way of reading the sentence, to connect the words "in such manner and at such time as aforesaid," with the words "in vestry assembled;" and then "assembled in such manner" will mean, among other things, assembled by virtue of a summons from the governors and guardians.

REGINA
F.

Governors of
St. Many,

NEWINGTON.

REGINA

Governors of St. Mary,
NEWINGTON.

I see no reason for supposing that the Legislature intended to make any distinction between the vestry which was to supply vacancies at the first election, and that which was to perform the same functions at succeeding Easters. The vestry meeting is a special one assembled, for the special purpose of this election, under the local act; the provisions of which generally, the governors and guardians must be supposed to be better acquainted with, than the ordinary parish officers; and it is more especially their duty to see that all necessary steps are taken for securing the proper elections into their own body.

The rule, therefore, will be absolute, and the writ will be directed to the governors and guardians, limited of course to the filling vacancies where the elections were made after the objection taken.

Rule absolute accordingly.

REGINA v. JUSTICES OF CUMBERLAND.

[This case is reported, ante vol. 5, p. 430.]

REGINA v. JUSTICES OF LANCASHIRE.
[This case is reported, ante vol. 5, p. 435.]

JEFFREYS v. BEART. [This case is reported, ante vol. δ , p. 646.]

In re a Plaint or Suit in the County Court of Cambridge, Between J. LILLEY - Plaintiff,

and

J. HARVEY - Defendant.

[This case is reported, ante vol. 5, p. 648.]

In re a Plaint or Action in the Westminster County Court of Middlesex,

Between EDWARD FOSTER and Another Plaintiffs, and

HENRY TEMPLE - Defendant. [This case is reported, ante vol. 5, p. 655.]

OWEN v. PEARSE.
[See a note of this case, ante vol. 5, p. 654, note (c).]

REGULA GENERALIS.

TRINITY TERM, 11 VICT.

1848.

REGULA GENERALIS

Whereas by a rule of Easter Term, in the seventh year of the reign of her present Majesty Queen Victoria, it was ordered, "That for the future it shall not be necessary to have a warrant of attorney to acknowledge satisfaction of a judgment, or a Judge's flat thereon; but that it shall be requisite only to produce a satisfaction piece similar to that in use in the Court of Queen's Bench, except that in all cases, such satisfaction piece shall be signed by the plaintiff or plaintiffs, or their personal representatives; and such signature or signatures shall be witnessed by a practising attorney of one of the Courts at Westminster, expressly named by him or them, and attending at his or their request to inform him or them of the nature and effect of such satisfaction piece before the same is signed; and which attorney shall declare himself in the attestation thereto, to be the attorney for the person or persons so signing the same, and state that he is witness as such attorney; but any Judge at Chambers shall have power to make an order dispensing with such signature of the plaintiff or plaintiffs, or their personal representatives, under special circumstances, as he may think right; and that in cases where the satisfaction piece is signed by the personal representative of a deceased plaintiff, he shall prove his representative character in such way as the Master may direct:" IT is ORDERED, that so much of the said rule as requires a satisfaction piece similar to that in use in the Court of Queen's

Bench to be produced, be revoked; and that the following form of satisfaction piece be in future used in lieu thereof.

1848.

REGULA

GENERALIS.

In the

Term, in the year of the reign of Queen Victoria.

Satisfaction is acknowledged between to wit. plaintiff, and defendant, in an action for and ; and do hereby expressly nominate and appoint attorney at law, to witness and attest execution of this acknowledgment of satisfaction.

Judgment entered on the day of in the year of our Lord 184 . Roll, No. .

Signed by the said in the presence of me, , one of the attornies of the Court of at West. minster, and I hereby declare myself to be attorney for and on behalf of the said , expressly named by h and attending at h request, to inform h of the nature and effect of this acknowledgment of satisfaction (which I accordingly did before the same was signed by h), and I also declare that I subscribe my name hereto as such attorney.

the above named plaintiff.
(Date) 184 .

(Signature.)

(Signed) DENMAN, T. COLTMAN,
THOS. WILDE, W. H. MAULE,
FRED. POLLOCK, WM. WIGHTMAN,
E. H. ALDERSON, C. CRESSWELL,
J. PATTESON, T. J. PLATT,
J. T. COLERIDGE, W. ERLE.

REGULA GENERALIS.

MICHAELMAS TERM, 12 VICT.

It is ordered, that for the future, if a motion for a new trial be postponed beyond the first four days of Term, the attorney who has instructed counsel to make the motion shall give notice of it to the attorney of the opposite party, otherwise judgment signed on behalf of the opposite party shall be deemed regular.

(Signed)	Denman,	T. Coltman,
	THOS. WILDE,	R. M. Rolfe,
	FRED. POLLOCK,	W. WIGHTMAN,
	J. Parke,	W. Erle,
	E. H. Alderson,	T. J. Platt,
	J. T. COLERIDGE.	E. V. WILLIAMS.

COURT OF EXCHEQUER.

Michaelmas Cerm.

IN THE TWELFTH YEAR OF THE REIGN OF VICTORIA.

DOE v. WELLSMAN (a).

DECLARATION in trespass for mesne profits. That Declaration the defendant heretofore, to wit, on the 10th day of December, A.D. 1844, with force and arms, &c., broke and stating the entered certain closes of the plaintiff, situate in the parish pulsion to have of Kentford, in the county of Suffolk, that is to say, the 10th of Defollowing allotments (describing them) and then ejected and the exand expelled, put out and amoved the plaintiff from the pulsion and possession and occupation thereof, and kept and continued fits to have him so expelled and amoved for a long time, to wit, from until the 10th the day and year aforesaid, until and upon the 10th day of March, A. D. 1846, and during that time took, had, and that the closes

(a) This case was decided in the sittings after Easter Term, 1848, but was accidentally omitted in its proper place.

in trespass for mesne profits, entry and extaking of probeen continued of March, 1846. Plea, in which, &c.,

were not nor

was any of them, or any

1848.

part thereof, the plaintiff's modo et forma. Replication to the whole of the plea, by way of estoppel, a recovery by the plaintiff against the casual ejector on a declaration in ejectment, stating the demise to have been on the 14th of October, 1845, for a term of twenty years, concluding with a prayer of judgment, if the defendant during that term ought to be admitted against the said recovery, record, and proceeding, to plead that plea. Held, on special demurrer, that the replication was bad, as the estoppel (if any) applied only to part of the time of the trespasses complained of, and, therefore, should have been replied to part only of the plea.

Quere, if a judgment against the casual ejector can be pleaded as an estoppel against the tenant in possession?

DOE D. WELLSMAN.

received, to the use of him the defendant, all the issues and profits of the said closes, &c.

Plea. That the said closes and allotments in the said declaration mentioned, in which, &c., were not, nor were any or either of them, or any part thereof, the plaintiff's, in manner and form, &c. Conclusion to the country.

The plaintiff, as to the plea of the Replication. defendant by him lastly above pleaded, says, that the defendant ought not to be admitted to plead the said last plea, because the plaintiff says, that after the said time when, &c., in the declaration mentioned, and before the commencement of this suit, to wit, in Trinity Term, A. D. 1845, in the Court of our Lady the Queen, before the Queen herself at Westminster, Richard Roe was attached to answer John Doe, the plaintiff in this suit, of a plea of trespass and ejectment, and thereupon the said John Doe, by Y. Z. his attorney, complained, for that whereas J. F. and M. A. B., on the 14th of October, 1845, in the county of Suffolk, demised to the said John Doe twenty acres of arable land, &c., with the appurtenances, situate and being in the said county, to have and to hold the same to the said John Doe and his assigns, from thenceforth for and during, and unto the full end and term of twenty years from thence next ensuing, and fully to be complete and ended; by virtue of which said demise the said John Doe entered into the said tenements last above mentioned, with the appurtenances, and was thereof possessed for the said term so to him granted; and the said John Doe being so thereof possessed, the said Richard Roe afterwards, to wit, on the 15th of October, in the year aforesaid, with force and arms, &c., entered into the said tenements above mentioned, with the appurtenances, which were demised to the said John Doe in manner and for the term aforesaid, which was not then expired, and ejected the said John Doe from his said term, and other wrongs to the said John Doe then did, against the peace of our said Sovereign Lady the now Queen, and to the damage of the said John Doe of 5001,

and thereupon he brought his suit. And on the 5th day of November, in Michaelmas Term in the year aforesaid, before our said Sovereign Lady the Queen at Westminster, came as well the said John Doe by his attorney aforesaid, as the said Richard Roe in his own proper person; and the said Richard Roe thereupon gave the said Court of our Lady the Queen, before the Queen herself at Westminster, to understand and be informed, that after the delivery of the said declaration last aforesaid, and before that day to wit, on the 16th of October, A.D. 1845, he, the said Richard Roe, being informed that one John Wellsman was in possession of or claimed title to the tenements last aforesaid, or some part thereof; and the said Richard Roe being sued in the action as casual ejector only, and having no claim or title to the same, advised the said John Wellsman to come and defend the force and injury which, &c., in the declaration last aforesaid mentioned, in the stead of him the said Richard Roc, otherwise he the said Richard Roe would say nothing in bar or preclusion of the said action of the said John Doe. And on the 16th of February, as of Hilary Term, A. D. 1846, in the year aforesaid, before our said Lady the Queen at Westminster, came as well the said John Doe by his attorney aforesaid, as the said John Wellsman by X. Y. his attorney; and thereupon the said parties respectively aforesaid, by their attorneys aforesaid, by leave of the Court of our Lady the Queen, before the Queen herself at Westminster, consented that the said John Wellsman should be made defendant in the stead of the said Richard Roe, and should forthwith appear at the suit of the plaintiffs, and receive a declaration in an action of trespass and ejectment for part of the tenements and premises aforesaid; which part the said John Wellsman admitted to be or consist of, &c., situate and being in the parish of Kentford, in the county of Suffolk, for which he intended as tenant to defend the said force and injury which, &c. And on the 6th of March, as of the same Hilary Term, A. D. 1846, came before our said Lady the

DOE v. WELLSMAN.

DOE v. WELLSMAN.

Queen at Westminster, the said Richard Roe in his own proper person, and as to, &c. (a part of the premises) residue of the said tenements in the declaration last aforesaid mentioned, defended the force and injury which, &c., and said nothing in bar or preclusion of the said action of the said John Doe; whereby the said John Doe remained therein undefended against the said Richard Roe as to the said residue of the said premises; and thereupon it was considered by the said Court of our said Lady the Queen, before the Queen herself at Westminster, that the said John Doe should recover against the said Richard Roe his term then to come of and in the said, &c., residue of the tenements last aforesaid, with the appurtenances, and also his damages sustained by reason of the trespass and ejectment aforesaid, and thereupon the said John Doe praved the writ of our said Lady the Queen to be directed to the sheriff of the county aforesaid, to cause him the said John Doe to have possession of his said term then to come of and in the said, &c., residue as aforesaid, with the appurtenances; and it was granted to him, returnable before our said Lady the Queen, on the 15th of April, A.D. 1846, wheresoever our said Lady the Queen should then be in England; at which day, before our said Lady the Queen at Westminster, came the said John Doe by his attorney aforesaid, and the sheriff, to wit, Sir A. B., Bart., sheriff of the said county, then returned to the said Court of our said Lady the Queen, before the Queen herself at Westminster, that by virtue of the said writ to him directed he had given full and peaceable possession unto the said John Doe of the said, &c., residue as aforesaid, with the appurtenances, in the said writ mentioned as therein, as he was commanded, as by the said record and proceedings thereof remaining in the said Court of our Lady the Queen, before the Queen herself at Westminster, fully appear. And the plaintiff saith that the now plaintiff and the said John Doe, in the said record and proceedings mentioned, are one and the same person, and not other or different persons; and

that the now defendant and the said John Wellsman in the said record and proceedings mentioned are one and the same person, and not other and different persons. the plaintiff further saith, that after the said John Doe had complained as in the said declaration in the said record and proceedings in that behalf mentioned, and before it was considered by the said Court of our said Lady the Queen, that the said John Doe should recover as in the said record and proceedings mentioned, to wit, on the 16th day of October, A. D. 1845, the said John Wellsman was advised by the said Richard Roe to come and defend the said force and injury which, &c., in the said record and proceedings mentioned, in the stead of him the said Richard Roe, as in the said record and proceedings in that behalf mentioned; and that the said John Wellsman, at the time that the said John Doe complained, as in the declaration last aforesaid mentioned, and at the time the said John Wellsman was so advised by the said Richard Roe, as in the said record and proceedings mentioned as aforesaid, to wit, on the day and year last aforesaid, was tenant in possession of the tenements and premises in the declaration last aforesaid mentioned. And the plaintiff further saith, that the said closes and tenements in which, &c., in the declaration in the causes mentioned, were and are parcel of the said, &c., residue of the said tenement in the declaration in the said recovery and writ, record and proceedings respectively mentioned as aforesaid, and not parcel of other or different tenements; and that the said term of years in the said record and proceedings mentioned was, at the time when, &c., in the said declaration in this cause mentioned, and thenceforth hitherto hath been and now is existing, subsisting, and not expired or determined: whereupon the plaintiff prays judgment, if the defendant during the said last mentioned term ought to be admitted against the said recovery, record, and proceedings, to plead the said plea by him so lastly above pleaded as aforesaid, in manner and form, &c.

DOE v. WELLSMAN.

Doe . Wellsman.

Special demurrer. The grounds stated, amongst others, were—that it appears from the replication that the term of twenty years therein mentioned was wholly fictitious: that the record therein stated was and is wholly void and invalid, so far as the same relates to the now defendant: that the defendant is not estopped by the said record: that it does not appear that he was a party or privy thereto, or that he was the tenant in possession of the lands in this cause mentioned, or in any wise connected therewith: that the suggestion made by Richard Roe in the replication is wholly insufficient to make the now defendant a party or privy to the record or proceeding in the prior action: that it appears by the replication that the term of years mentioned in the record and in the replication was not in existence or subsisting, and had not commenced at the time when the defendant is in the declaration in this cause alleged to have broken and entered the closes mentioned in the declaration, and thereout to have ejected and expelled the plaintiff: that the replication in this respect is insensible and repugnant: that the plea is a divisible plea, and that the plaintiff ought not to have replied the matter to the whole of the plea, but only to the trespasses committed after the commencement of the term of years in the replication mentioned; and that the defendant ought not to be estopped by the judgment set forth in the replication.

Joinder in demurrer.

Crompton, in support of the demurrer.

Bovill, contrà.

The following authorities were cited in the argument; 1 Roll. Abr. 862, 878; Vivian v. Jenkin (a); Doe v. Wright (b); Co. Litt. 352, a; Bac. Abr. tit. "Ejectment," (H) and (A);

(a) 3 A. & E. 741; S. C. 5 N. (b) 10 A. & E. 763; S. C. 2 P. & M. 14. (b) 672.

Smartle v. Williams (a); Doe v. Huddart (b); Aslin v. Parkin (c); Armstrong v. Norton (d); Jefferies v. Dyson (e); Doe v. Harvey (f); Denn v. White (g); Hunter v. Britts (h); Holdfast v. Morris (i); Goodtitle v. Tombs (k); Ramsbottom v. Buckhurst (l); Outram v. Morewood (m); Strutt v. Bovingdon (n); Doe d. Bowman v. Lewis (o).

DOB 5. WELLSMAN.

Cur. adv. vult.

Pollock, C. B., afterwards (p) delivered the judgment of the Court.

This case was argued before us a few days ago, on a demurrer to a replication. The declaration was in trespass for mesne profits, stating the entry and expulsion to have been on the 10th of December, 1844, and the expulsion and taking of profits to have been continued until the 10th of March, 1846. To this there was a plea that the closes in which, &c., were not, nor was any of them, or any part thereof, the plaintiff's, modo et formâ. plaintiff replied to the whole of this plea by way of estoppel, a recovery by the plaintiff against the casual ejector on a declaration in ejectment, stating the demise to have been on the 14th of October, 1845, for a term of twenty years; and the replication concludes with a prayer of judgment, if the defendant during that term ought to be admitted against the said recovery, record, and proceedings, to plead that plea. To this replication there was a special demurrer, assigning many causes, and, amongst the rest, that the estoppel applied only to part of the time

- (a) 1 Salk. 245.
- (b) 2 C., M. & R. 316; S. C.
- 4 Dowl. 437.
 - (c) 2 Burr. 665.
 - (d) 2 Irish Law Rep. 96.
 - (e) 2 Stra. 960.
- (f) 8 Bing. 239; S. C. 1 M. & Scott, 374.
 - (g) 7 T. R. 112.
 - (A) 3 Campb. 455.

- (i) 2 Wils. 115.
- (k) 3 Ibid. 118.
- (l) 2 M. & S. 565.
- (m) 3 East, 346.
- (n) 5 Esp. 56.
- (o) 13 M. & W. 241; S. C. ante, vol. 2, p. 667.
- (p) In the Vacation after Easter Term, 1848.

Dor v. Wellsman. of the trespasses complained of; and therefore, should have been replied to part only of the plea. On the argument this point was, amongst others, fully argued. We think it unnecessary to give an opinion on any other of the objections, being satisfied that this ought to prevail.

Assuming that there was an estoppel, and that it could be replied to such a plea (as to which we say nothing), it was an estoppel only to the possessory title of John Doe, on the 14th of October, 1845, and during the term of twenty years; whereas, under the declaration, the plaintiff might recover the mesne profits from the 10th of December, 1844. The plea is not an affirmative one, introductory of new matter, but a negative one, denying the allegation that the close in which, &c., was the plaintiff's at the time of the trespasses. It is not an entire plea, which, if untrue in part, is untrue altogether, but divisible; and if, when part of the trespasses were committed, the close was the plaintiff's, and when the residue not, the plaintiff would recover as to part, and the defendant succeed as to the residue of the trespasses. If, then, the defendant were estopped as to part from denying the plaintiff's title, that was no reason why he should be estopped as to the remainder. replication is, therefore, though pleaded to the whole, an answer (if it be an answer at all) to part of the pleading; and, on that account, is clearly bad.

But it was argued by Mr. Bovill, that this point had been otherwise decided in the case of Doe v. Wright (a). It cannot be denied that it is said by Lord Denman, in the course of the judgment, that the plea of not possessed was "pleaded to the whole, and that it is enough for the plaintiff to shew that it cannot be pleadable to that," to make the plea bad. The objection to the replication did not appear so prominently in that case as it does in this, for there the first day in the declaration, and the

day of the demise in the ejectment, were identical; and the terms covered the whole of the intermediate time to the commencement of the suit; here a portion only of the term is covered. Nor do the Court appear to have sufficiently adverted to the consideration that a traverse does not stand on the same footing in this respect as an affirmative plea containing new matter by way of confession and avoidance.

Doe v. Wellsman.

We think our judgment must be for the defendant.

Judgment for the Defendant.

FREEMAN and Another Assignees, &c. of W. Broadbent v. COOKE.

THIS was a rule calling upon the plaintiffs to shew cause why the verdict for the plaintiffs should not be set aside, and a verdict be entered instead thereof for the defendant, pursuant to leave reserved at the trial.

Where a person resents that the pursuant to leave reserved at the trial.

The facts and arguments in this case are sufficiently intentional intentional intentional and thereby indices another indices and thereby

W. H. Watson, Atherton, and H. Hill, shewed cause (a).

Knowles (with whom was Hall), in support of the rule.

(a) In the Vacation after Trinity Term.

person represents that to be true which he knows to be untrue, with and thereby induces another to act upon that representation; or without knowing it to be untrue, if be means his representation to be acted upon, and it is acted upon accordingly; or if whatever

a man's real meaning may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and does act on it as true; the party making the representation will be precluded from averring against the party so acting upon it, a different state of facts as existing at the same time; and such an estoppel in pais need not be pleaded in order to make it obligatory.

Conduct by negligence or omission, when there is a duty cast upon a person by usage of trade or otherwise, to disclose the truth, may often have the same effect.

FREEMAN and Another v. Cooke.

The following authorities were referred to; Coote v. Lighworth (a); Com. Dig. tit. "Imprisonment," (L 2); Thurbane's case (b); Com. Dig. tit. "Action for a Deceit," (A 10); Price v. Harwood (c); Pickard v. Sears (d); Like v. Howe (e); Clarke v. Clarke (f); Watson v. Wace (g); Heane v. Rogers (h); Polhill v. Walter (i); The Sheffield, Ashton under Lyne, and Manchester Railway Company v. Woodcock (k); Sanderson v. Collman (l); Gregg v. Wells (m); Coles v. The Bank of England (n); Collins v. Evans (o); Armani v. Castrique (p); Doe v. Wellsman (q); Banks v. Newton (r).

Cur. adv. vult.

PARKE, B., afterwards delivered the judgment of the Court (s).

In this case we are of opinion that the rule ought to be discharged.

It was an action of trover by the assignces of William Broadbent against the sheriff of Yorkshire, for goods of the bankrupt. There were pleas of not guilty; not possessed; and leave and license. The conversion was the seizure of the goods by the defendant's officers, under a fieri facias against Joseph and Benjamin Broadbent. It appeared that when the officers entered, the bankrupt told them the

- (a) Moore, 457.
- (b) Hardr. 323.
- (c) 3 Campb. 108.
- (d) 6 A. & E. 469; S. C. 2 N. & P. 488.
 - (e) 6 Esp. 20.
 - (f) Ibid. 61.

& R. 496.

- (g) 5 B. & C. 153; S. C. 7 D. & R. 633.
- (h) 9 B. & C. 577; S. C. 4 M.
- (i) 3 B. & Ad. 114.
- (k) 7 M. & W. 574.
- (l) 4 M. & G. 209; S. C. 4

Scott, N. R. 638.

- (m) 10 A. & E. 90; S. C. 2 P.
- & D. 296.
- (n) 10 A. & E. 437; S. C. 2 P. & D. 521.
- (o) 5 Q. B. 820; S. C. 1 D. & M. 669.
- (p) 13 M. & W. 443; S. C. ante, vol. 2, p. 432.
 - (q) Ante, p. 179.
 - (r) Ante, vol. 4, p. 632.
- (s) Purke, B., Alderson, B., Rolfe, B., and Platt, B.

goods seized were the property of Benjamin. supposing that they had no writ against Benjamin. wards he contradicted that statement, and said they were the goods of another person. The officers then seized and It was contended that this representation bound William, because it induced the officers to seize, and that he could not complain of that act, nor could the assignees who claimed under him. My Brother Alderson left a question to the jury upon this part of the case, the finding on which he reserved for the consideration of the Court. giving leave to enter a verdict for the defendant on the issue on the plea of not possessed. The jury found that the goods were really William's, but they also found "that William represented the goods to the sheriff's officers as the goods of Benjamin, so as to induce them by that false representation to seize them;" and the question is, whether this finding is sufficient to estop the bankrupt, and the plaintiffs, his assignees, from complaining of the seizure of those goods as being their own.

The case was very fully argued before us, and many questions discussed on the law of estoppel, on which it is unnecessary to give an opinion. It is certain that estoppels by record and by deed must, in order to make them binding, be pleaded, if there be an opportunity; otherwise the party omitting to plead it waives the estoppel, and leaves the issue at large, on which the jury may find according to the truth; Treviban or Trevivan v. Lawrence (a), and Magrath v. Hardy (b). With respect to estoppels in pais, in certain cases there is no doubt they need not be pleaded in order to make them obligatory; for instance, where a man represents another as his agent, in order to procure a person to contract with him as such, and he does contract, the contract binds in the same manner as if he made it himself, and is his contract in point of law; and no form of pleading could leave such a matter at large and enable the jury to FREEMAN and Another

⁽a) 2 Ld. Raym. 1048; S. C. 1 Salk. 276.

⁽b) 4 Bing. N. C. 782.

FREEMAN and Another v. Cooke.

treat it as no contract; and the same rule appears to apply to all similar estoppels in pais, as the learned editor of *Wms. Saund.* vol. 1, p. 326, note (d), expresses his opinion.

The estoppel, therefore, if it be one, created by the conduct of the bankrupt in this case, is not opened by the omission to plead it, and the only question is, whether it be an estoppel. It is contended that it was, upon the authority of the rule laid down in Pickard v. Sears (a). That rule is, that "where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." That rule was founded on previous authorities, on the cases of Graves v. Key (b), and Heane v. Rogers (c), and has been acted upon in several cases since. The principle is stated more broadly by Lord Denman in the case of Gregg v. Wells (d), where his Lordship says, "that a party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving." Whether that rule has been correctly acted upon by the jury, in all the reported cases in which it has been applied, is not now the question: but the proposition contained in the rule itself as above laid down in the case of Pickard v. Sears, must be considered as established.

By the term "wilfully," however, in that rule we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real meaning may be, he so conducts himself that a reasonable man would

⁽a) 6 A. & E. 469, 474.

⁽b) 3 B. & Ad. 313.

⁽c) 9 B. & C. 577.

⁽d) 10 A. & E. 90, 8.

take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth. And conduct by negligence or omission, when there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect; as, for instance, a retiring partner omitting to inform the customers of the firm, in the usual mode, that the continuing partners were no longer authorized to act as his agents, is bound by all contracts made by them with third persons on the faith of their being authorized.

But if we apply this rule to the present case, either in the terms in which it is enunciated in Pickard v. Sears (a), or as it is above extended, the finding of the jury is insufficient to entitle the defendant to have a verdict entered for him on the plea of not possessed. It is not found that the bankrupt intended to induce the officers to seize the goods as those of Benjamin, and whatever intention he had on his first statement, was done away with by an opposite statement before the seizure took place; nor can it be said that any reasonable man would have seized the goods on the faith of the bankrupt's representations taken all together-In truth, in most cases to which the doctrine in Pickard v. Sears is to be applied, the representation is such as to amount to the contract or license of the party making it. Here there is no pretence for saying it amounted to a license; and a contract is out of the question. We therefore think the rule must be discharged.

Rule discharged.

(a) 6 A. & E. 469.

FREEMAN and Another v. Cooke.

DOE on the demise of Woodhouse v. Roe.

A declaration in ejectment, intituled as of Trintty Term, 12 Vict., a Term which had not then arrived, instead of 11 Vict., was served on the 18th of October, 1848. The notice, which was without date. called on the tenant to appear in the next Michaelmas Term: Held, that the lessor of the plaintiff was entitled to judgment against the casual ejector.

PARTRIDGE moved for judgment against the casual ejector. The declaration was entitled as of Trinity Term, 12 Vict., instead of the 11th. The notice, which was without any date, called upon the tenant to appear in the next Michaelmas Term. The notice was served on the 18th of October. He referred to the decision of Doe d. Gyde v. Roe (a), where, under similar circumstances, a rule was granted.

PARKE, B.—There are three authorities; Doe d. Gyde v. Roe; Doe d. Greene v. Roe (b); Doe d. Woodroffe v. Roe (c), in support of your application, and one against it; Doe d. Vincent v. Roe (d). The balance of authority, therefore, is in your favour, and you are entitled to a rule.

ALDERSON, B.—It is impossible that the parties could have been misled.

PER CURIAM.

Rule granted (e).

- (a) Ante, vol. 3, p. 309; S. C. 4 M. & W. 788.
 - (b) 8 Scott, 385.
 - (a) r Saate N. D. soo. S. C.
 - (c) 5 Scott, N. R. 800; S. C.
- renie granteu (e)
- 4 M. & G. 810.
 - (d) 9 Dowl. 43.
- (e) See also Doe d. Yeomans v. Roe, ante, vol. 2, p. 23.

BOWEN v. EVANS.

PRICE moved on behalf of the plaintiff in this suit, for a An application certiorari to remove the above cause from the County Court to remove an of Carmarthen into this Court. It was an action of replevin, plevin from a and the affidavit upon which he moved stated that the title County Court into one of to the land, on which the distress complained of had been the superior levied, was in question; that the plaintiff, on the 14th of Westminster, November, attended at the said County Court at Car- 9 & 10 Vict. marthen, and declared to the said Court that the rent in c. 95, s. 121, respect of which the distress was taken was more than 201, made to a and that the title to the said premises was in dispute; that Chambers. he became bound with two sufficient sureties who were and not to the full Court. approved of, in the sum of 300L, being the sum which, to the Judge of the said Court, seemed reasonable, regard being had to the nature of the claim and the alleged value of the property in dispute, to prosecute the suit with effect, and without delay, according to the provisions of the statute in that case made and provided; and that on the trial of the said action, several important questions of law would have to be determined by the Court in which such action should be tried. He relied on the 9 & 10 Vict. c. 95, s. 121. which enacts, "that in case either party to any such action of replevin" brought in a County Court, "shall declare to the Court in which such action shall be brought, that the title to any corporeal or incorporeal hereditament, or to any toll, market, fair, or franchise, is in question, or that the rent or damage in respect of which the distress shall have been taken is more than the sum of twenty pounds, and shall become bound, with two sufficient sureties, to be approved by the clerk of the Court, in such sums as to the Judge shall seem reasonable, regard being had to the nature of the claim, and the alleged value or amount of the property in dispute, or of the rent or damage, to prosecute the suit with effect and without delay, and to prove before the Court by which such suit shall be tried,

Bowen t. Evans that such title as aforesaid is in dispute between the parties, or that there was ground for believing that the said rent or damage was more than twenty pounds, then, and not otherwise, the action may be removed before any Court competent to try the same, in such manner as hath been accustomed."

PER CURIAM (a).—This application must be made to a Judge at Chambers. There have been many similar cases at Chambers. The object of the statute is to diminish the amount of expense; and by the course which the plaintiff is seeking to pursue, the expenses would be quadrupled. If the Judge entertains any doubt, or feels any difficulty, he can refer the matter for our consideration.

Rule refused.

(a) Pollock, C. B., Parke, B., Alderson, B., and Rolfe, B..

WOOD v. PERRY.

In an action brought in this Court on a tailor's bill, under 204, it appeared that the plaintiff resided and carried on his business within the jurisdiction of the Clerkenwell County

BADDELEY had obtained a rule calling upon the plaintiff to shew cause why he should not bring the postea into Court, and file the plea roll, so that the defendant might enter a suggestion thereon to deprive the plaintiff of his costs, the verdict being for a sum less than 20L, for which a plaint might have been levied in a district County Court, under the statute 9 & 10 Vict. c. 95.

Court; that the defendant resided within that of Brompton, and carried on his business within that of Westminster. The bill consisted of twenty-one items. As to three of these, the orders for them were given, and the goods delivered at the defendant's residence, and the work done at the plaintiff's residence. As to ten others, the orders were given and the goods delivered at the defendant's place of business, and the work done at plaintiff's residence. And in one case, both the order was given, the work done, and the goods delivered at plaintiff's residence: Held, that these items were so connected as to form but one cause of action; that one item having arisen within the jurisdiction of a County Court, the cause arose "in a material point" within that jurisdiction; that the superior Court had no concurrent jurisdiction under the 9 & 10 Vict. c. 95, a. 128; and that, therefore, the case came within the 129th section, which deprives the plaintiff of costs.

The affidavit stated that an action had been brought in the superior Court by the plaintiff against the defendant; that it was tried before the sheriff of Middlesex on the 3rd of August last, and a verdict found for the plaintiff for 101. 7s. The plaintiff was a tailor, who resided and carried on his business in Chapel Street, Pentonville, Islington, within the jurisdiction of the Clerkenwell County Court. The defendant, a hairdresser and perfumer, residing at No. 7, Clarendon Villa, Bridge Road, Hammersmith, within the jurisdiction of the Brompton County Court, and carrying on his business at the Burlington Arcade, within the jurisdiction of the Westminster County Court. The plaintiff's bill, which was for clothes made for and supplied to the defendant, consisted of twenty-one items. As to three of the items, the orders for them were given and the goods delivered at the defendant's residence, within the Brompton jurisdiction, and the work done at the plaintiff's residence. As to ten other items, the orders were given and the goods delivered at the Burlington Arcade, and the work done at the plaintiff's residence. And in one case, both the order was given and the work done and goods delivered at the plaintiff's residence.

W. H. Watson shewed cause. The plaintiff was correct in bringing his action in the superior Court. The debt consisted of different items, as to some of which the cause of action arose within the jurisdiction of the Court within which defendant resided; as to some, in that of the Court within which he carried on his business; and as to others, within that of the Court within which plaintiff resided. It did not, therefore, come within the 9 & 10 Vict. ss. 128 and 129. [He was then stopped by the Court, who called upon]

Baddeley to support the rule. According to the true construction of the 9 & 10 Vict. c. 95, ss. 128 and 129, the plaintiff was bound to bring his action either in the Brompton or

Wood v. Perry. Wood
PERRY.

Westminster County Court, and not in the superior Court. If any doubt exists, that construction should be adopted which is in favour of the jurisdiction of the inferior Court; Wimbish v. Tailbois (a); Bac. Abr. tit. "Courts," (D); Butler v. Corney (b). The words of the 128th section are, "where the cause of action did not arise wholly or in some material point within the jurisdiction of the Court within which the defendant dwells or carries on his business, &c." If various items of a debt accrue in different parts, a creditor is not to split his demand and to go into different Courts to seek separate remedies; In re Aukroyd (c). some material part of a plaintiff's demand arises within the jurisdiction of the County Court within which he resides or carries on his business, the suit should be brought in that Court. In this case a material portion of the plaintiff's demand did arise within the jurisdiction of the Court in which the defendant resided.

Watson, contrà. The construction sought to be put on the statute is erroneous. "Material point" does not mean a mere portion of the demand, but a "point" connected with the whole cause of action. Here there are two causes of action; one for work done, and the other for goods sold, and the case comes within the decision in Neale v. Ellis (d), where it was held, that a plaintiff having demands for the price of a horse, for goods sold and delivered, and for rent, was entitled, after having recovered the price of the horse in a county Court, to sue in the superior Court, for the residue of his claim; as the three causes of action were distinct.

Cur. adv. vult.

ALDERSON, B., afterwards (e) delivered the judgment of the Court.

(a) Plowden, 59.

vol. 5, p. 701.

(b) Since reported, ante, p. 45.

(d) Ante, vol. 1, p. 163.

(c) 1 Exch. 479; S. C. ante,

(e) In Hilary Vacation, 1849.

This was an application to the Court for a rule that the plaintiff should have judgment for his debt recovered in this cause without costs, on the ground that he had sued in this Court, when the cause of action had arisen "wholly or in some material point" within the jurisdiction of the Small Debts Court of Brompton, within which jurisdiction the defendant was resident.

The question originally came in the long Vacation before me at Chambers, and I ordered that, on payment of the debt to the plaintiff, the further proceedings should be stayed till the fourth day of Michaelmas Term.

The facts of the case, as they appear on the affidavits, are these:—The plaintiff was a tailor, who resided and carried on his business in Chapel Street, Pentonville, Islington, within the jurisdiction of the Clerkenwell County Court. The defendant was a hairdresser and perfumer, residing within the jurisdiction of the Brompton County Court, and carrying on his business at the Burlington Arcade, within the jurisdiction of the Westminster County The plaintiff's demand is for a bill containing various items of clothes made for and supplied to the As to three of the items of the plaintiff's bill, the orders for them were given and the goods delivered at the defendant's residence within the Brompton jurisdiction, and the work done at the plaintiff's residence. other items, the orders were given and the goods delivered at the Burlington Arcade, and the work done at the plaintiff's residence. And in one case both the order was given, and the work done and goods delivered, at the plaintiff's residence.

The question then is, whether under the 128th section of the 9 & 10 Vict. c. 95, this Court had a concurrent jurisdiction in this matter. Here the plaintiff dwells within twenty miles of the defendant; and the question is, whether the cause of action arose "wholly or in some material point" within the jurisdiction of the County Courts of Brompton, where the defendant resided, or of Westminster, where he carried on his business when this action was brought.

WOOD D. PERRY.

WOOD b. PERRY.

It seems clear, that if each of the items is to be treated as constituting a separate cause of action, one whole cause of action arose out of either jurisdiction, and then it would seem to follow that the superior Court was the only Court in which the whole demand could be recovered in one action. But we think this must be determined in conformity with the rule laid down by this Court in Re Aukroyd (a). We there laid it down, that where a tradesman has a bill against a party for any amount in which the items are so connected together that it appears that the dealing is not intended to terminate with one contract, but to be continued, so that one item if not paid shall be united with another, and form one continuous demand, the whole together forms but one cause of action, and cannot be In other words, we held that the words "cause of action" in this act of Parliament meant "cause of one action," and were not to be limited to an action upon one separate contract. Now here, the items in this bill are thus connected together, and the whole bill forms one cause of action. Then, if so, it follows that it is a cause of action not "wholly" occurring within the jurisdiction of the County Court either of Brompton or of Westminster, for a part of it occurs within the jurisdiction of Clerkenwell, where the defendant neither resides nor carries on his business. But does it arise in some "material point" within the two first jurisdictions, or either of them? We think it does; and we are disposed to determine the question by laying down some definite rule which may be easily acted upon; and to hold that if any one item arises within the jurisdiction of a County Court in such a bill as this, the cause of action in some material point arises within that jurisdiction. this case, therefore, as the superior Court has no concurrent jurisdiction under the 128th section, the case falls within the 129th section of the act, and this rule must be made absolute.

Rule absolute.

(a) 1 Exch. 479.

BROOKER v. COOPER.

HURLSTONE had obtained a rule, calling on the To deprive plaintiff to shew cause, why he should not forthwith bring the postea into Court, and file the plea roll, and why judgment should not be entered thereon for the sum of a 129, it is 61. 6s. 6d. only, being the amount of the verdict recovered in this action; and why the defendant should not be at liberty to enter a suggestion on the roll, to deprive the the roll; for plaintiff of costs, pursuant to the statute 9 & 10 Vict. c. 95, the defendant The affidavit on which the rule was moved, stated affirmatively that the action was brought to recover the sum of 61.6s. 6d., for goods sold and delivered by plaintiff to defendant; that tiff does not at the trial, which took place before the sheriff of Surrey any of the on the 22nd of August last, the plaintiff recovered a verdict for the sum of 61. 6s. 6d., and no more; that defendant at the time of the commencement of the suit resided and dwelt, and does still reside and dwell at 2, Elizabeth Street, Locksfields, Walworth, in the county of Surrey; and that plaintiff at the time of the commencement of the suit carried on his trade and business of a builder, within a short distance of the residence of the defendant, namely, on Walworth Common, in the said county of Surrey. That plaintiff's cause of action arose in Walworth, in the county of Surrey, within the jurisdiction of the Camberwell County Court for Surrey, held at Denmark Hill, Camberwell, in the said county, and not elsewhere; and that the residence of the defendant was within the jurisdiction of the said County Court. That no officer of any County Court was a party to the action, or was so at the commencement of the suit. That defendant at the time of the commencement of the suit was liable to be summoned to the said County Court for payment of the said sum; and that for the said cause of action a plaint might have been entered against him by the plaintiff in the said Court. That the said Camberwell County Court for Surrey, held

entered on by affidavit that the plainspecified in the 128th

BROOKER v. COOPER.

at Denmark Hill, is a Court constituted under the 9 & 10 Vict. c. 95; and that the Judge, before whom the cause was tried, did not certify that the said cause was fit to be brought in a superior Court.

Collier shewed cause. The affidavit is not sufficient, as it does not clearly shew that the plaintiff ought to have brought his action in the County Court. The application is founded on the 128th and 129th sections. By the 128th section it is enacted, "that all actions and proceedings which, before the passing of this act, might have been brought in any of her Majesty's superior Courts of record, where the plaintiff dwells more than twenty miles from the defendant, or where the cause of action did not arise wholly or in some material point within the jurisdiction of the Court within which the defendant dwells or carries on his business at the time of the action brought, or where any officer of the County Court shall be a party, except in respect of any claim to any goods and chattels taken in execution of the process of the Court, or the proceeds or value thereof, may be brought and determined in any such superior Court at the election of the party suing or proceeding, as if this act had not been passed." By section 129 it is enacted, "that if any action shall be commenced after the passing of this act, in any of her Majesty's superior Courts of record, for any cause other than those lastly herein-before specified, for which a plaint might have been entered in any Court, holden under this act, and a verdict shall be found for the plaintiff for a sum less than twenty pounds, if the said action is founded on contract, or less than five pounds, if it be founded on tort, the said plaintiff shall have judgment to recover such sum only, and no costs; and if a verdict shall not be found for the plaintiff, the defendant shall be entitled to his costs as between attorney and client, unless in either case the Judge who shall try the cause shall certify on the back of the record that the action was fit to be brought in such superior Court." Now, it has

been expressly decided by the Court of Common Pleas, that in order to deprive the plaintiff of costs under the latter section, the defendant must shew affirmatively that the case is not within any of the exceptions mentioned in the former section; Meetan v. Nicholls (a). And the rule there laid down has been subsequently recognised and acted on by this Court, in the case of Butler v. Corney (b). This the defendant has failed to do. His affidavit does not state that the plaintiff dwelt within twenty miles of the defendant's place of residence; all that it alleges is, that the plaintiff carried on his trade or business within a short distance of the residence of the defendant, namely, on Walworth Common. Court cannot say that a short distance is less than twenty The Court cannot take judicial notice, that Walworth Common is within twenty miles of Elizabeth Street.

BROOKER
v.
COOPER.

Hurlstone, in support of the rule. The affidavit is sufficient for the object for which it is sought to be used. The rule is of a twofold character, first, that judgment should be entered for the sum recovered only; and, secondly, that the defendant should be at liberty to enter a suggestion on the roll to deprive the plaintiff of costs. The cases cited on the other side were simply applications to enter a suggestion on the roll. And although, upon their authority the defendant may be held to be precluded from claiming the latter branch of the rule, it is submitted that he is still entitled to the first. The language of the 129th section is relied on, which says, "if any action shall be commenced after the passing of this act in any of her Majesty's superior Courts of record, for any cause other than those lastly herein-before specified, for which a plaint might have been entered in any Court holden under this act, and a verdict shall be found for the plaintiff for a sum less than

⁽a) Ante, vol. 5, p. 799; S. C. 5 C. B. 848.

⁽b) Since reported, ante, p. 45.

BROOKER

v.
COOPER.

twenty pounds," "the said plaintiff shall have judgment to recover such sum only, and no costs." The only duty, therefore, that it imposes on the defendant is, to shew that the cause was one for which a plaint might have been entered in a County Court. On the affidavit this distinctly appears, for it avers that a verdict was found for a sum less than 201, that the cause arose, and the plaintiff dwelt within the jurisdiction of the Camberwell County Court. Having done that, the onus falls on the plaintiff to prove that he comes within the exceptions specified, and is not bound to sue in an inferior Court. Under the old Court of Requests' Acts, the affidavit might have been insufficient. But the language used in them differs materially from, and is far more stringent than that employed in the present statute. By the 3 Jac. 1, c. 15, s. 4, it is enacted, that "if in any action of debt," &c., "it shall appear to the Judge or Judges of the Court where such action shall be sued," &c., "that the debt to be recovered by the plaintiff in such action doth not amount to the sum of forty shillings, and the defendant in such action shall duly prove, either by sufficient testimony, or by his own oath, to be allowed by any the Judge or Judges of the said Court where such action shall depend, that at the time of the commencing of such action such defendant was inhabiting and resiant in the city of London, or the liberties thereof, as above, that in such case the said Judge or Judges shall not allow to the said plaintiff any costs of suit," &c. From this, therefore, it is manifest that certain facts were to be ascertained and established to the satisfaction of the Court before the plaintiff could be deprived of his costs. But here nothing of the kind is required. Parke, B.—You must have a suggestion. There must be some reason assigned on the record, why the plaintiff should not get his costs. You must bring your case within the words of the 129th section, which are, "for any cause other than those lastly herein-before specified," you must shew by your affidavit that the action was commenced for a cause other than those before specified, and that it was one

for which a plaint might have been entered in the County This was the principle laid down in the case of Meetan v. Nicholls (a), and Butler v. Corney (b). These cases were applications to enter a suggestion on the record. [Parke, B.—The application to enter up a judgment for costs only is the same thing. The rule was long since adopted, that if there is any reason for departing from the Statute of Gloucester, then it must be shewn by a suggestion on the record, in order that the plaintiff might, if he pleased, be at liberty to traverse it. This was established by this Court in the case of Watson v. Quilter (c), where the law relating to suggestions was fully gone into.] By the 129th section it is required, that the Judge should certify on the back of the record that the action was fit to be brought in a superior Court. And yet it has been decided by the Court of Queen's Bench, in the case Nind v. Rhodes (d), that the affidavit need not negative that fact.

Pollock, C. B.—The reason why it is unnecessary to negative that is, that the record is in Court, and will speak for itself.

PER CURIAM.

Rule discharged.

- (a) Ante, vol. 5, p. 799; S. C. 5 C. B. 848.
- (c) 11 M. & W. 760.
- (b) Since reported, ante, p. 45.

(d) Ante, vol. 5, p. 621.

BROOKER

v.
COOPER.

1848.

NORTON v. WALKER.

To an action against the sheriff for an escape, Held, on special demurrer, that it was a good plea under the 5 & 6 Vict. c. 122, s. 23. that a flat had issued under which the prisoner had been, by the proper Court, declared bankrupt, that he had been arrested while returning from his surrender. and that on the production of his summons duly signed, the defendant had discharged him; without averring that he had been duly declared bankrupt.

The words
"such bankrupt" in the
5 & 6 Vict.
c. 122, a. 23,
mean the
party so adjudged bankrupt; a bankrupt de facto,
even though
he be not a
bankrupt de
jure.

CASE against the sheriff of Yorkshire. The first count of the declaration stated, that a judgment had been recovered by the plaintiff in the Court of Exchequer against John Robinson and Thomas Turlay, for the sum of 1319L, damages and costs. That thereupon the plaintiff sued out a ca. sa. against the said Robinson and Turlay, directed to the sheriff of Yorkshire, and duly indorsed and delivered it That afterwards the defendant, as such sheriff to him. within his bailiwick, took and arrested the said Robinson and Turlay, and then by virtue of the said writ kept and detained them in his custody from thence, until the defendant, as such sheriff, to wit, on, &c., without the leave or license, and against the will of the plaintiff, suffered and permitted the said John Robinson to escape and go at large, wheresoever he would, out of the custody of the defendant, then being such sheriff, the said sum of money being then and still wholly unpaid and unsatisfied.

The third count, after stating the judgment, and the suing out and lodging of the ca. sa. with the defendant, proceeded to state that, before the writ was executed, a fiat in bankruptcy was issued against Robinson and Turlay, directed to the Leeds District Court of Bankruptcy, under which fiat Mr. Burge, then one of the Commissioners of the said District Court, adjudged the said Robinson and Turlay to be bankrupts, and that a duplicate of such adjudication having been served on each of them the said Robinson and Turlay, Robinson surrendered to the fiat and gave his consent in writing to the adjudication. then went on to state, that after such surrender, but before the expiration of five days from the service of the said duplicate on each of them the said Robinson and Turlay, and before Turlay had surrendered or consented to the adjudication, the defendant by virtue of the said writ of ca. sa. arrested the said Robinson, and afterwards, before the expiration of the said five days, discharged the said Robinson from custody. It also charged certain other breaches of duty by the defendant, which, however, were not material in the present case.

NORTON D. WALKER.

Third plea to the first count. That theretofore and before the taking and arresting in the first count mentioned, &c., the said Robinson and Turlay were sharebrokers and copartners in trade, subject to the bankrupt laws; that they filed in the office of the Lord Chancellor's secretary of bankrupts—each a declaration in writing of insolvency; that they afterwards petitioned the Lord Chancellor to issue a fiat against them in bankruptcy; that the Lord Chancellor, upon reading the said petition so made to him, &c., duly made and issued, within two months from the said filing of the said declaration, the said Lord Chancellor's fiat in bankruptev against them the said Robinson and Turlay under his hand, and directed to the District Court of Bankruptcy at Leeds, &c.; by virtue of which said fiat, the said District Court duly adjudged and declared the said Robinson and Turlay to be bankrupts, &c.; that a duplicate of such adjudication was served on the said Robinson and Turlay severally; that afterwards, &c., within five days from the service of the said duplicate of adjudication, Robinson surrendered to the fiat, and gave his consent in writing to the adjudication and that the same might be advertised; that afterwards, to wit, on, &c., the said Court appointed certain days for the sittings for the said Robinson and Turlay to surrender and conform according to the statutes then in force concerning bankruptcy; that the said District Court caused a summons in writing, signed by W. Burge, being then a Commissioner of the said Court, to be served personally upon the said Robinson before the first of the days appointed for the sittings, by which summons, after reciting that a fiat in bankruptcy had been awarded and issued forth against the said Robinson and Turlay, they were required personally to appear before the said Court on the 6th of February, or on the 20th of February, 1847, such last day

Wood
".
PERRY.

Westminster County Court, and not in the superior Court. If any doubt exists, that construction should be adopted which is in favour of the jurisdiction of the inferior Court; Wimbish v. Tailbois (a); Bac. Abr. tit. "Courts," (D); Butler v. Corney (b). The words of the 128th section are, "where the cause of action did not arise wholly or in some material point within the jurisdiction of the Court within which the defendant dwells or carries on his business, &c." If various items of a debt accrue in different parts, a creditor is not to split his demand and to go into different Courts to seek separate remedies; In re Aykroyd (c). some material part of a plaintiff's demand arises within the jurisdiction of the County Court within which he resides or carries on his business, the suit should be brought in that Court. In this case a material portion of the plaintiff's demand did arise within the jurisdiction of the Court in which the defendant resided.

Watson, contrà. The construction sought to be put on the statute is erroneous. "Material point" does not mean a mere portion of the demand, but a "point" connected with the whole cause of action. Here there are two causes of action; one for work done, and the other for goods sold, and the case comes within the decision in Neale v. Ellis (d), where it was held, that a plaintiff having demands for the price of a horse, for goods sold and delivered, and for rent, was entitled, after having recovered the price of the horse in a county Court, to sue in the superior Court, for the residue of his claim; as the three causes of action were distinct.

Cur. adv. vult.

ALDERSON, B., afterwards (e) delivered the judgment of the Court.

- (a) Plowden, 59.
- vol. 5, p. 701.
- (b) Since reported, ante, p. 45.
- (d) Ante, vol. 1, p. 163.
- (c) 1 Exch. 479; S. C. ante,
- (e) In Hilary Vacation, 1849.

This was an application to the Court for a rule that the plaintiff should have judgment for his debt recovered in this cause without costs, on the ground that he had sued in this Court, when the cause of action had arisen "wholly or in some material point" within the jurisdiction of the Small Debts Court of Brompton, within which jurisdiction the defendant was resident.

The question originally came in the long Vacation before me at Chambers, and I ordered that, on payment of the debt to the plaintiff, the further proceedings should be stayed till the fourth day of Michaelmas Term.

The facts of the case, as they appear on the affidavits, are these:—The plaintiff was a tailor, who resided and carried on his business in Chapel Street, Pentonville, Islington, within the jurisdiction of the Clerkenwell County The defendant was a hairdresser and perfumer, residing within the jurisdiction of the Brompton County Court, and carrying on his business at the Burlington Arcade, within the jurisdiction of the Westminster County The plaintiff's demand is for a bill containing various items of clothes made for and supplied to the defendant. As to three of the items of the plaintiff's bill, the orders for them were given and the goods delivered at the defendant's residence within the Brompton jurisdiction, and the work done at the plaintiff's residence. other items, the orders were given and the goods delivered at the Burlington Arcade, and the work done at the plaintiff's residence. And in one case both the order was given, and the work done and goods delivered, at the plaintiff's residence.

The question then is, whether under the 128th section of the 9 & 10 Vict. c. 95, this Court had a concurrent jurisdiction in this matter. Here the plaintiff dwells within twenty miles of the defendant; and the question is, whether the cause of action arose "wholly or in some material point" within the jurisdiction of the County Courts of Brompton, where the defendant resided, or of Westminster, where he carried on his business when this action was brought.

Wood v. Prary. Wood v. Perry.

It seems clear, that if each of the items is to be treated as constituting a separate cause of action, one whole cause of action arose out of either jurisdiction, and then it would seem to follow that the superior Court was the only Court in which the whole demand could be recovered in one action. But we think this must be determined in conformity with the rule laid down by this Court in Re Aukroyd (a). We there laid it down, that where a tradesman has a bill against a party for any amount in which the items are so connected together that it appears that the dealing is not intended to terminate with one contract, but to be continued, so that one item if not paid shall be united with another, and form one continuous demand, the whole together forms but one cause of action, and cannot be In other words, we held that the words "cause of action" in this act of Parliament meant "cause of one action," and were not to be limited to an action upon one separate contract. Now here, the items in this bill are thus connected together, and the whole bill forms one cause of action. Then, if so, it follows that it is a cause of action not "wholly" occurring within the jurisdiction of the County Court either of Brompton or of Westminster, for a part of it occurs within the jurisdiction of Clerkenwell, where the defendant neither resides nor carries on his business. does it arise in some "material point" within the two first jurisdictions, or either of them? We think it does; and we are disposed to determine the question by laying down some definite rule which may be easily acted upon; and to hold that if any one item arises within the jurisdiction of a County Court in such a bill as this, the cause of action in some material point arises within that jurisdiction. In this case, therefore, as the superior Court has no concurrent jurisdiction under the 128th section, the case falls within the 129th section of the act, and this rule must be made absolute.

Rule absolute.

1848.

BROOKER v. COOPER.

HURLSTONE had obtained a rule, calling on the To deprive plaintiff to shew cause, why he should not forthwith bring the postea into Court, and file the plea roll, and why judgment should not be entered thereon for the sum of a 129, it is 6L 6s. 6d. only, being the amount of the verdict recovered a suggestion should be in this action; and why the defendant should not be at liberty to enter a suggestion on the roll, to deprive the the roll; for plaintiff of costs, pursuant to the statute 9 & 10 Vict. c. 95, s. 129. The affidavit on which the rule was moved, stated that the action was brought to recover the sum of 61.6s.6d., for goods sold and delivered by plaintiff to defendant; that tiff does not at the trial, which took place before the sheriff of Surrey any of the on the 22nd of August last, the plaintiff recovered a verdict for the sum of 61. 6s. 6d., and no more; that defendant at the time of the commencement of the suit resided and dwelt, and does still reside and dwell at 2, Elizabeth Street, Locksfields, Walworth, in the county of Surrey; and that plaintiff at the time of the commencement of the suit carried on his trade and business of a builder, within a short distance of the residence of the defendant, namely, on Walworth Common, in the said county of Surrey. That plaintiff's cause of action arose in Walworth, in the county of Surrey, within the jurisdiction of the Camberwell County Court for Surrey, held at Denmark Hill, Camberwell, in the said county, and not elsewhere; and that the residence of the defendant was within the jurisdiction of the said County Court. That no officer of any County Court was a party to the action, or was so at the commencement of the suit. That defendant at the time of the commencement of the suit was liable to be summoned to the said County Court for payment of the said sum; and that for the said cause of action a plaint might have been entered against him by the plaintiff in the said Court. That the said Camberwell County Court for Surrey, held

of costs under the 9 & 10 Vict. c. 95, necessary that entered on which p the defendant must shev specified in the 128th

BROOKER v. Copper.

at Denmark Hill, is a Court constituted under the 9 & 10 Vict. c. 95; and that the Judge, before whom the cause was tried, did not certify that the said cause was fit to be brought in a superior Court.

The affidavit is not sufficient, as it Collier shewed cause. does not clearly shew that the plaintiff ought to have brought his action in the County Court. The application is founded on the 128th and 129th sections. By the 128th section it is enacted, "that all actions and proceedings which, before the passing of this act, might have been brought in any of her Majesty's superior Courts of record, where the plaintiff dwells more than twenty miles from the defendant, or where the cause of action did not arise wholly or in some material point within the jurisdiction of the Court within which the defendant dwells or carries on his business at the time of the action brought, or where any officer of the County Court shall be a party, except in respect of any claim to any goods and chattels taken in execution of the process of the Court, or the proceeds or value thereof, may be brought and determined in any such superior Court at the election of the party suing or proceeding, as if this act had not been passed." By section 129 it is enacted, "that if any action shall be commenced after the passing of this act, in any of her Majesty's superior Courts of record, for any cause other than those lastly herein-before specified, for which a plaint might have been entered in any Court, holden under this act, and a verdict shall be found for the plaintiff for a sum less than twenty pounds, if the said action is founded on contract, or less than five pounds, if it be founded on tort, the said plaintiff shall have judgment to recover such sum only, and no costs; and if a verdict shall not be found for the plaintiff, the defendant shall be entitled to his costs as between attorney and client, unless in either case the Judge who shall try the cause shall certify on the back of the record that the action was fit to be brought in such superior Court." Now, it has

been expressly decided by the Court of Common Pleas, that in order to deprive the plaintiff of costs under the latter section, the defendant must shew affirmatively that the case is not within any of the exceptions mentioned in the former section; Meetan v. Nicholls (a). And the rule there laid down has been subsequently recognised and acted on by this Court, in the case of Butler \forall . Corney (b). This the defendant has failed to do. His affidavit does not state that the plaintiff dwelt within twenty miles of the defendant's place of residence; all that it alleges is, that the plaintiff carried on his trade or business within a short distance of the residence of the defendant, namely, on Walworth Common. Court cannot say that a short distance is less than twenty The Court cannot take judicial notice, that Walworth Common is within twenty miles of Elizabeth Street.

Hurlstone, in support of the rule. The affidavit is sufficient for the object for which it is sought to be used. The rule is of a twofold character, first, that judgment should be entered for the sum recovered only; and, secondly, that the defendant should be at liberty to enter a suggestion on the roll to deprive the plaintiff of costs. The cases cited on the other side were simply applications to enter a suggestion on the roll. And although, upon their authority the defendant may be held to be precluded from claiming the latter branch of the rule, it is submitted that he is still entitled to the first. The language of the 129th section is relied on, which says, "if any action shall be commenced after the passing of this act in any of her Majesty's superior Courts of record, for any cause other than those lastly herein-before specified, for which a plaint might have been entered in any Court holden under this act, and a verdict shall be found for the plaintiff for a sum less than

BROOKER
v.
COOPER.

⁽a) Ante, vol. 5, p. 799; S. C. 5 C. B. 848.

⁽b) Since reported, ante, p. 45.

BROOKER

S.
COOPER.

twenty pounds," "the said plaintiff shall have judgment to recover such sum only, and no costs." The only duty, therefore, that it imposes on the defendant is, to shew that the cause was one for which a plaint might have been entered in a County Court. On the affidavit this distinctly appears, for it avers that a verdict was found for a sum less than 201, that the cause arose, and the plaintiff dwelt within the jurisdiction of the Camberwell County Court. Having done that, the onus falls on the plaintiff to prove that he comes within the exceptions specified, and is not bound to sue in an inferior Court. Under the old Court of Requests' Acts, the affidavit might have been insufficient. But the language used in them differs materially from, and is far more stringent than that employed in the present statute. By the 3 Jac. 1, c. 15, s. 4, it is enacted, that "if in any action of debt," &c., "it shall appear to the Judge or Judges of the Court where such action shall be sued," &c., "that the debt to be recovered by the plaintiff in such action doth not amount to the sum of forty shillings, and the defendant in such action shall duly prove, either by sufficient testimony, or by his own oath, to be allowed by any the Judge or Judges of the said Court where such action shall depend, that at the time of the commencing of such action such defendant was inhabiting and resiant in the city of London, or the liberties thereof, as above, that in such case the said Judge or Judges shall not allow to the said plaintiff any costs of suit," &c. From this, therefore, it is manifest that certain facts were to be ascertained and established to the satisfaction of the Court before the plaintiff could be deprived of his costs. But here nothing of the kind is required. [Parke, B.—You must have a suggestion. There must be some reason assigned on the record, why the plaintiff should not get his costs. You must bring your case within the words of the 129th section, which are, "for any cause other than those lastly herein-before specified," you must shew by your affidavit that the action was commenced for a cause other than those before specified, and that it was one

for which a plaint might have been entered in the County This was the principle laid down in the case of Meetan v. Nicholls (a), and Butler v. Corney (b). cases were applications to enter a suggestion on the record. [Parke, B.—The application to enter up a judgment for costs only is the same thing. The rule was long since adopted, that if there is any reason for departing from the Statute of Gloucester, then it must be shewn by a suggestion on the record, in order that the plaintiff might, if he pleased, be at liberty to traverse it. This was established by this Court in the case of Watson v. Quilter (c), where the law relating to suggestions was fully gone into.] By the 129th section it is required, that the Judge should certify on the back of the record that the action was fit to be brought in a superior And yet it has been decided by the Court of Queen's Bench, in the case Nind v. Rhodes (d), that the affidavit need not negative that fact.

Pollock, C. B.—The reason why it is unnecessary to negative that is, that the record is in Court, and will speak for itself.

PER CURIAM.

Rule discharged.

- (a) Ante, vol. 5, p. 799; S. C.
- (c) 11 M. & W. 760.
- 5 C. B. 848. (d) Ante, vol. 5, p. 621.
 - (b) Since reported, ante, p. 45.

1848. BROOKER

COOPER.

1848.

NORTON v. WALKER.

To an action against the sheriff for an escape, Held, on special demurrer, that it was a good plea under the 5 & 6 Vict. c. 122, s. 23, that a flat had issued under which the prisoner had been, by the proper Court, declared bankrupt, that he had been arrested while returning from his surrender, and that on the production of his summons duly signed, the defendant had discharged him; without averring that he had been duly declared bankrupt.

The words
"such bankrupt" in the
5 & 6 Vict.
c. 122, s. 23,
mean the
party so adjudged bankrupt; a bankrupt de facto,
even though
he be not a
bankrupt de
jure.

CASE against the sheriff of Yorkshire. The first count of the declaration stated, that a judgment had been recovered by the plaintiff in the Court of Exchequer against John Robinson and Thomas Turlay, for the sum of 1319L, damages and costs. That thereupon the plaintiff sued out a ca. sa. against the said Robinson and Turlay, directed to the sheriff of Yorkshire, and duly indorsed and delivered it to him. That afterwards the defendant, as such sheriff within his bailiwick, took and arrested the said Robinson and Turlay, and then by virtue of the said writ kept and detained them in his custody from thence, until the defendant, as such sheriff, to wit, on, &c., without the leave or license, and against the will of the plaintiff, suffered and permitted the said John Robinson to escape and go at large, wheresoever he would, out of the custody of the defendant, then being such sheriff, the said sum of money being then and still wholly unpaid and unsatisfied.

The third count, after stating the judgment, and the suing out and lodging of the ca. sa. with the defendant, proceeded to state that, before the writ was executed, a fiat in bankruptcy was issued against Robinson and Turlay, directed to the Leeds District Court of Bankruptcy, under which fiat Mr. Burge, then one of the Commissioners of the said District Court, adjudged the said Robinson and Turlay to be bankrupts, and that a duplicate of such adjudication having been served on each of them the said Robinson and Turlay, Robinson surrendered to the fiat and gave his consent in writing to the adjudication. then went on to state, that after such surrender, but before the expiration of five days from the service of the said duplicate on each of them the said Robinson and Turlay, and before Turlay had surrendered or consented to the adjudication, the defendant by virtue of the said writ of ca. sa. arrested the said Robinson, and afterwards, before

the expiration of the said five days, discharged the said Robinson from custody. It also charged certain other breaches of duty by the defendant, which, however, were not material in the present case. NOBTON 9.
WALKER.

Third plea to the first count. That theretofore and before the taking and arresting in the first count mentioned, &c., the said Robinson and Turlay were sharebrokers and copartners in trade, subject to the bankrupt laws; that they filed in the office of the Lord Chancellor's secretary of bankrupts—each a declaration in writing of insolvency; that they afterwards petitioned the Lord Chancellor to issue a fiat against them in bankruptcy; that the Lord Chancellor, upon reading the said petition so made to him, &c., duly made and issued, within two months from the said filing of the said declaration, the said Lord Chancellor's fiat in bankruptcy against them the said Robinson and Turlay under his hand, and directed to the District Court of Bankruptcy at Leeds, &c.; by virtue of which said fiat, the said District Court duly adjudged and declared the said Robinson and Turlay to be bankrupts, &c.; that a duplicate of such adjudication was served on the said Robinson and Turlay severally; that afterwards, &c., within five days from the service of the said duplicate of adjudication, Robinson surrendered to the fiat, and gave his consent in writing to the adjudication and that the same might be advertised; that afterwards, to wit, on, &c., the said Court appointed certain days for the sittings for the said Robinson and Turlay to surrender and conform according to the statutes then in force concerning bankruptcy; that the said District Court caused a summons in writing, signed by W. Burge, being then a Commissioner of the said Court, to be served personally upon the said Robinson before the first of the days appointed for the sittings, by which summons, after reciting that a fiat in bankruptcy had been awarded and issued forth against the said Robinson and Turlay, they were required personally to appear before the said Court on the 6th of February, or on the 20th of February, 1847, such last day

NORTON U. WALKER.

being the day limited for the surrender of the said bankrupts at the said District Court of Bankruptcy at Leeds, to be examined and to make a full and true discovery and disclosure of all their estate and effects, &c.; that afterwards, and before the first of the days appointed, Robinson did surrender and submit to be examined, but that not being then prepared to make a full discovery and disclosure of his estate and effects, he prayed for further time for the purpose; that the Court did then appoint until the 26th of February then next ensuing, which said appointment of further time was then and there indorsed and signed by W. Burge, then being and as such Commissioner as aforesaid, upon the said summons, and which said summons so indorsed was then delivered to Robinson. The plea then went on to state, that after the delivery of the writ to the defendant in the said first count mentioned, the defendant, as such sheriff, issued his warrant to his bailiff, James Whalley, and thereby commanded him to take the said Robinson and Turlay and them safely keep, to satisfy the plaintiff's damages. It then proceeded as follows:—By virtue of which said last mentioned writ and warrant the said James Whalley, so then being and as such bailiff as aforesaid, and within the said bailiwick, afterwards and after the said making of the said indorsement on the said summons, and after the delivery of the said summons so indorsed as aforesaid to the said John Robinson, and before the time so appointed and limited as aforesaid for the surrender of the said John Robinson and Thomas Turlay as aforesaid had expired, and before the expiration of the said five days from the said service of the said duplicate of adjudication, and whilst the said John Robinson was bonâ fide and within a reasonable time in that behalf after his said surrender returning from his said surrender as aforesaid, and before the said 26th day of February, in the year of our Lord 1847, and at the said time, &c. in the first count mentioned, to wit, on the 22nd day of January, in the year of our Lord 1847, the said James Whalley, within

the said bailiwick of the defendant as such sheriff, as such bailiff, and by the defendant's command as such sheriff took and arrested the said John Robinson by his body, which is the said taking and arresting of the said John Robinson by his body by the defendant in the first count mentioned; and thereupon forthwith afterwards, and before the said time so appointed and limited as aforesaid for the surrender of the said John Robinson and Thomas Turlay as aforesaid had expired, and before the expiration of the said five days from the said service of the said duplicate of adjudication, and before the said 26th day of February, in the year of our Lord 1847, to wit, on the day and year last aforesaid, the said John Robinson produced to the said James Whalley, so then being and as such bailiff as aforesaid, the said summons so indorsed as aforesaid, and so signed by the said William Burge as such Commissioner as aforesaid, and then gave to the said James Whalley, so then being and as such bailiff as aforesaid, a copy of the said summons so signed and indorsed as aforesaid, and of the said indorsement so made and signed as aforesaid, and then claimed to be privileged from the said taking and arresting and detaining in custody of him the said John Robinson, and then requested the said James Whalley to discharge him the said John Robinson forthwith out of the said custody of the said James Whalley, as such bailiff as aforesaid, and to suffer and permit the said John Robinson forthwith to go at large; and thereupon the said James Whalley, so being and as such bailiff as aforesaid, forthwith afterwards, and before the said time so appointed and limited as aforesaid for the surrender of the said John Robinson and Thomas Turlay as aforesaid had expired, and before the expiration of the said five days from the said service of the said duplicate of adjudication, and before the said 26th day of February, in the year of our Lord 1847, to wit, on the 22nd day of January, 1847, discharged the said John Robinson accordingly out of the said custody of the said James Whalley, as such bailiff as aforesaid, and NORTON v. WALKER.

NORTON v. WALKER.

suffered and permitted the said John Robinson to go at large; as he lawfully might for the cause aforesaid; and the said John Robinson did then go at large, wheresoever he would, out of the said custody of the said James Whalley, as such bailiff as aforesaid; which is the said suffering and permitting the said John Robinson to escape and go at large by the plaintiff in the said first count mentioned. Verification.

The eighth plea to the first count followed the third, down to, and including, the arrest of Robinson, and then proceeded as follows: — And thereupon forthwith afterwards, and before the said time so appointed and limited as aforesaid for the surrender of the said Robinson and Turlay as aforesaid had expired, and before the expiration of the said five days from the said service of the said duplicate of adjudication, and whilst the said Robinson was so bonâ fide and within a reasonable time in that behalf after his said surrender returning from the said surrender as aforesaid, the said Robinson claimed to be privileged from the said taking and arresting and detaining in custody of him the said Robinson as aforesaid, and then requested the said James Whalley to discharge him forthwith out of his custody, as such bailiff as aforesaid, and to suffer and permit him forthwith to go at large, of all which said several premises the said James Whalley, at the time of the making of the said last mentioned claim of privilege by the said Robinson, as such officer as aforesaid, had notice; and, thereupon, the said Whalley, being such bailiff, forthwith and afterwards, and before the said time so appointed and limited as aforesaid for the surrender of the said Robinson and Turlay as aforesaid had expired, and before the expiration of the said five days from the said service of the said duplicate of adjudication, and whilst the said Robinson was so bonâ fide and within a reasonable time in that behalf after his said surrender as aforesaid returning, to wit, on, &c., discharged the said Robinson accordingly out of the custody of the said J. Whalley, as such bailiff as aforesaid, and suffered and permitted the said Robinson to go at large; as he lawfully might for the cause aforesaid; and the said Robinson did then go at large, wheresoever he would, out of the custody of the said Whalley, as such bailiff as aforesaid; which is the said suffering and permitting the said Robinson to escape and go at large by the plaintiff in the first count mentioned. Verification.

The seventh and ninth pleas set up similar defences to so much of the third count as related to the escape.

Special demurrer to the third and seventh pleas, assigning for causes, that it does not appear distinctly or sufficiently by any of the allegations in the said pleas, that the Chancellor had authority to issue the fiats at the time when the same were so issued: that it is not properly alleged, nor does it appear with sufficient certainty by any of the allegations of the said pleas, that the summons therein mentioned were regularly or properly, or at all, by the direction of a competent Court, or otherwise, served, but the same is left to argument and inference only; that it is alleged in the said pleas, that the said district Court caused notice of the adjudication to be advertised, and appointed the said sittings for the said John Robinson and Thomas Turlay to surrender, within the five days from the service of the duplicate of the adjudication; and after the said Robinson alone had surrendered to the said fiats, and given his consent that the said adjudications should be advertised; that there is no proper, or other allegation or statement, that the said Turlay had surrendered or given such consent; that the said Court had no power to appoint sittings for the two bankrupts to surrender and conform within the five days, and before both had surrendered and given consents in writing to the adjudication being advertised; that the allegation that the said Court caused the notice to be advertised in pursuance of the statute is not a direct or proper allegation, that every thing had taken place which authorized them in pursuance of the statute to cause such notice to be advertised, but all things necessary to

NORTON U. WALKER.

VOL. VL P D, & L.

NORTON

WALKER

authorize the advertisement ought to be directly and distinctly averred; that the said summons so ordered to be issued as in the said pleas mentioned, was not a lawful summons, and could not lawfully be issued by the said Court or the commissioner at the time when the same was issued; that the said district Court had no authority to make the indorsement on the said summons; and that the summons and indorsement did not form a sufficient privilege from arrest, and did not warrant the discharge of the said Robinson from custody.

Special demurrer also to the eighth and ninth pleas, assigning, in addition to the causes already stated, the following; that the statement that the said John Robinson surrendered on the 22nd day of January, and before the first of the days appointed by the said district Court for the said sittings in pursuance of the said summons, is incongruous and unintelligible; that the allegations that the said Robinson submitted to be examined from time to time is defective, either because there is no time alleged at all, or because it is an unintelligible allegation, that, at a particular time, the bankrupt submitted to be examined from time to time; that the allegation that the said Robinson was not in custody at the time of the surrender is ambiguous, two surrenders having been previously mentioned; that the plea is ambiguous in this, that it is alleged therein that the said Robinson was arrested while returning from his said surrender, two surrenders having been mentioned previously; that it is not alleged or stated with sufficient certainty in the said pleas, by reason of what privilege in particular the said Robinson was privileged from arrest.

Joinders in demurrer.

Cleasby, in support of the demurrers. The third and the seventh, and the eighth and the ninth pleas, being similar, it will be only necessary to draw the attention of the Court to the third and the eighth. The third plea is bad for ambiguity. It sets out two surrenders by Robinson, and then proceeds

to aver, that whilst the said Robinson was within a reasonable time after his said surrender, returning from his said surrender as aforesaid, the defendant arrested him. this it is uncertain on which of the surrenders it is his intention to rely; and no traverse can, therefore, be safely taken on either. The allegation also, that the Chancellor duly made and issued his fiat within two months from the filing of the said declaration is defective; for this, being a joint bankruptcy, the Chancellor had no power to issue his fiat until declarations had been filed by all the bankrupts: the word "declaration," therefore, should have been in the plural and not in the singular number. But the plea is also bad in substance. The question is, whether in the case of a joint fiat, a summons to surrender and conform within five days of the service of the adjudication, when both bankrupts have not surrendered and given their consent in writing to the said adjudication, is valid. depend on the construction put on the 5 & 6 Vict. c. 122, s. 23 (a). By that section, a duplicate of the adjudication NORTON TO.

(a) 5 & 6 Vict. c. 122, s. 23. "That before notice of any adindication of bankruptcy under any fiat in bankruptcy issued after the commencement of this act shall be given in the London Gazette, and at or before the time of putting in execution any warrant of seizure which shall have been granted upon such adjudication, a duplicate of such adjudication shall be served on the person so adjudged bankrupt personally, or by leaving the same at the usual place of abode or place of business of such person, and that such person shall be allowed five days from the service of such duplicate to shew cause to the Court authorised to act in the prosecution of

the fiat under which such adjudication shall have been made, against the validity of such adjudication; and that if such person shall, within the time hereby allowed in that behalf, shew to the satisfaction of such Court that the petitioning creditor's debt, trading, and act of bankruptcy, upon which such adjudication shall have been grounded, or that any or either of such matters, are insufficient to support such adjudication, and upon such shewing no other creditor's debt, trading, and act of bankruptcy, sufficient to support such adjudication, or such of the said last mentioned matters as shall be requisite to support such adjudication in lien of the petitioning creditor's

NORTON U. WALKER.

of bankruptcy is to be served on the person adjudged bankrupt, before notice of it is advertised; the person so served is to have five days allowed for shewing cause

debt, trading, and act of bankruptcy, or any or either of such matters which shall be deemed insufficient in that behalf, as the case may be, shall be proved to the satisfaction of such Court. such Court shall thereupon cause a memorandum in writing to be filed with the proceedings under such fiat that such adjudication is annulled, and the same shall thereby be annulled accordingly; but if at the expiration of the said time no cause shall have been shewn to the satisfaction of such Court for the annulling of such adjudication, such Court shall forthwith, after the expiration of such time, cause notice of such adjudication to be given in the London Gazette, and shall thereby appoint two public sittings of such Court for the bankrupt to surrender and conform; the last of which sittings shall be on a day not less than thirty days and not exceeding sixty days from such advertisement, and shall be the day limited for such surrender: Provided always. that if such person so adjudged bankrupt shall, after such adjudication, and before the expiration of the time so allowed for shewing cause as aforesaid, surrender to such fiat, and give his consent, testified in writing under his hand before such Court, to such adjudication, and that the same may be advertised, such Court, after such consent so given as aforesaid, shall forthwith cause

notice of such adjudication to be advertised, and appoint the sittings for the bankrupt to surrender and conform in manner aforesaid; and such person so adjudged bankrupt shall be free from arrest or imprisonment by any creditor in coming to surrender, and after such surrender during the time by this act limited for such surrender, and such further time as shall be allowed him for finishing his examination, and for such time after finishing his examination, until his certificate be allowed and confirmed, as such Court shall from time to time, by indorsement upon the summons of such bankrupt, think fit to appoint, provided he was not in custody at the time of such surrender; and if such bankrupt shall be arrested for debt or on any escape warrant in coming to surrender, or shall after his surrender be so arrested within the time aforesaid, he shall, on producing his summons signed as required by this act to the officer who shall arrest him, and giving such officer a copy thereof, be immediately discharged; and if any officer shall detain any such bankrupt after he shall have shewn such summons to him. such officer shall forfeit to such bankrupt for his own use, the sum of five pounds for every day he shall detain such bankrupt, to be recovered by action of debt in any Court of record at Westagainst the adjudication. If it appear to be insufficient, then the adjudication is to be annulled. If at the expiration of the five days, no cause has been shewn, the Court shall then appoint two public sittings for the bankrupt to surrender and conform. Then there is a proviso, that if a person so adjudged bankrupt shall, before the expiration of the five days, surrender to the fiat, and give his consent to the advertisement, then the Court shall appoint sittings for the bankrupt to surrender and conform; and that such person shall be free from arrest or imprisonment by any creditor in coming to surrender, and after such surrender during the time limited by this act for such surrender, and such further time as shall be allowed him for finishing his examination; and for such time after finishing his examination until his certificate be allowed and confirmed, as such Court shall from time to time by indorsement upon the summons think fit to appoint; and if such bankrupt shall be arrested in coming to surrender, or after his surrender, within the time allowed he shall on producing his summons signed as required by the act, to the officer who shall arrest him, and giving him a copy, be immediately discharged. By the interpretation clause, section 93, "every word importing the singular number only, shall extend and be applied to several persons or things, as well as one person or thing." When, therefore, there is a joint fiat, as in the present instance, the word "bankrupt," throughout the whole of the 23rd section, must be read as "bankrupts." Adopting that construction, it is clear that the commisNORTON U. WALKER.

minster, in the name of such bankrupt, with full costs of suit; and it shall be lawful for the Court authorized to act in the prosecution of such fiat at the time appointed for the last examination of the bankrupt, or any enlargement or adjournment thereof, to adjourn such examination sine die; and in such case he shall be free from arrest or imprisonment for such time not exceeding three months, as such Court shall from time to time by indorsement upon the summons of such bankrupt appoint, with like penalty upon any officer detaining such bankrupt after having been shewn such summons."

NORTON 5. WALKER.

sioner is invested with no authority to issue a summons within the five days to joint bankrupts to surrender, unless all have previously surrendered. The consent of one is not sufficient, and can afford no ground for proceeding against both. Here, from the allegations in the plea it appears, that Robinson and Turlay had been adjudged bankrupts; that a duplicate of such adjudication had been served upon them; that within the five days Robinson alone surrendered and gave his consent, and that the commissioner issued his summons to both to surrender and conform. This the commissioner was not empowered to do. The summons, therefore, and subsequent indorsement were invalid, and could afford no protection; and being so invalid, the sheriff was bound to ascertain that fact before he discharged him from custody.

The 8th plea is also bad, as well upon the grounds above pointed out, as for other reasons. It differs from the preceding plea in this, that it places the right to be discharged, not upon the production of the indorsed summons, but upon the privilege which a bankrupt enjoys in going to and returning from his surrender. The protection is ambiguously stated. It does not appear what species of protection is relied on. It is not enough to say that some protection is to be inferred; it should be clearly shewn what is the nature of the protection. This, therefore, will be holden to be a fatal objection.

Cowling, contrà. The pleas are good, and afford a sufficient justification for the sheriff. The summons and indorsement were valid. Their invalidity has been contended for on the other side, on the ground that the language of the 5 & 6 Vict. c. 122, s. 23, when construed by that of section 93, is clear and explicit, that a summons cannot be issued within the five days allowed, after the service of the duplicate of the adjudication, unless both bankrupts have surrendered; that from the allegations in the pleas it appears, that only one of them, Robinson, had

surrendered; that the commissioner had, therefore, exceeded his authority in granting the summons, and that it consequently could afford no protection. But this argument is fallacious, and proceeds on an incorrect view of the Neither the 23rd section by itself, nor when taken in connection with the 93rd section, will admit of such an interpretation. The interpretation clause does indeed say, that "every word importing the singular number only. shall be applied to several persons or things, as well as one person or thing;" but that is allowed only in certain cases, where "the nature of the provision or the context of the act shall not exclude such a construction." Here the nature of the provision clearly excludes such a construction; for were it adopted, it would lead to an absurdity. The words "person" and "bankrupt" must be read jointly and severally as the case requires. This is evident from the 5 Geo. 2, c. 30, and the 6 Geo. 4, c. 16. In the 1st and 5th sections of the first mentioned act, the expressions used are bankrupt or bankrupts, and in the 118th section of the latter, the term "bankrupt" alone is employed, and the interpretation clause says nothing about giving words in the singular the force of words in the plural. If, therefore, the phraseology introduced there were to be construed literally, it would have the effect of destroying joint fiats altogether. Following the construction above suggested, it is evident that the surrender of both of the bankrupts was not indispensable, and that the summons is good. But admitting that the summons is illegal, still the sheriff was bound to discharge Robinson on its production. In Montagu and Aurton's Treatise on the Law of Bankruptcy (a), the proper form of summons is used, and in this case that precedent has been strictly followed. By the 5 & 6 Wm. 4, c. 29, s. 25, after reciting that doubts had been entertained whether by 1 & 2 Wm. 4, c. 56, the Courts of review and

NORTON
D.
WALKER.

(a) Vol. 2, p. 35, 2nd ed.

NORTON

WALKER

the subdivision Courts had been made Courts of record, it is enacted, that the said Courts shall be, and be deemed to have been, and taken to have been, Courts of record, &c., and that every Judge or commissioner appointed or to be appointed by the said first recited act, sitting alone and acting in execution of the duties imposed upon him as such Judge and commissioner, shall have, use, exercise, and enjoy, all the powers, rights, privileges, and exemptions of a Court of record. Here there was a document drawn in a correct form, issuing from a Court of competent jurisdiction, and duly signed and indorsed by the commissioner, and the sheriff could not refuse to obey it. He could not stop to inquire whether the fiat had been properly issued,—it might have been superseded; but with that he had nothing to do. 5 Geo. 2, c. 30, has been already referred to, and on a further examination of its provision, it will be seen what was the object of the Legislature in passing 5 & 6 Vict. c. 122, By the 1st section it is enacted, that if any person or persons against whom a commission of bankruptcy shall have issued, shall not within forty-two days after notice thereof in writing, &c., surrender him, her, or themselves, to the said commissioners named in the said commission, &c., they shall be deemed and adjudged to be guilty of felony. By the 5th section it is provided, that all and every bankrupt or bankrupts having surrendered as aforesaid, &c., shall be free from arrest in coming to surrender, and from the actual surrender, for and during the said forty-two days, or such further time as shall be allowed to such bankrupt or bankrupts for finishing his or their examinations, &c., and in case such bankrupt shall be arrested coming to surrender, or after his surrender shall be arrested within the time before mentioned, that then on producing such summons or notice under the hands of the commissioner, &c., and giving such officer a notice thereof, he shall be immediately discharged. The object of this

NORTON U. WALKER.

act was twofold, to frighten the bankrupt into surrendering, and to encourage him so to do by protecting him from arrest. It must be construed, therefore, as favourably as possible for the sheriff. That act was repealed by 6 Geo. 4, c. 16, but the same provisions were re-enacted. similar regulations are found in 5 & 6 Vict. c. 122, s. 23, and must, therefore, bear the same construction. authorities decided are favourable to the view now submitted to the Court. In Thomas v. Hudson (a), it was decided, that the keeper of the Queen's Prison was bound to discharge the prisoner from custody on an order from the commissioner of the Court of Bankruptcy to that effect, whether the debt for which he had been arrested was or was not one from which the commissioner had power to discharge. In Ex parte Wood (b), Lord Eldon held, that a protection granted to a bankrupt at a private meeting on his application, the day after he was served with notice, and before the first public meeting, was good. [Alderson, B.—In a case tried before me at Liverpool, which was an indictment against a bankrupt for not surrendering to his commission, I held, that it was not necessary that the summons should contain an averment that the prisoner had been duly adjudged a bankrupt (c), and the Judges on a case reserved afterwards confirmed my decision. Parke, B.—In the case of Saffery v. Jones (d), it was held, that it is a good defence to an action against a sheriff or goaler for an escape, that he discharged the prisoner from custody by virtue of an order of the Insolvent Debtors' Court; and that it was not necessary that he should shew that the proceedings upon which the order is grounded were properly taken]. But, further, if there had been no written summons, the bankrupt would still have been privileged from arrest; Arding v. Flower (e). There Lord

⁽a) 14 M. & W. 353; S. C. C. C. 287.

ante, vol. 2, p. 873.

⁽d) 2 B. & Ad. 598.

⁽b) 18 Ves. 8.

⁽e) 8 T. R. 534; S. C. 3 Esp.

⁽c) Regina v. Dealtry, Denison 11

NORTON U. WALEER.

Kenyon, C. J., says, "on the principal question, I think that the bankrupt was privileged from the arrest; and my opinion does not proceed upon the words or construction of the statute of Geo. 2, but on general principles, considering the bankrupt in the character of a witness or party attending commissioners employed under the authority of an act of Parliament, sitting in the nature of a Court in the administration of justice. If the attendance of the party or persons so authorized be required, in order to give them material information on the subject of their inquiry, it cannot be made a question, whether or not he is entitled to protection from arrest upon such an occasion. It was said by Lord Henley, that the commissioners are a Court of justice sufficient for the purpose of having their witnesses protected, at least by the Court of Chancery, if not by themselves. If so, I cannot distinguish between the case of a witness, and that of the party himself, whose presence may be equally necessary to explain his own case. Et ubi eadem est ratio, idem est jus." As to the objections to form. The word declaration is, indeed, in the singular, and not in the plural, but that is quite immaterial. All that was necessary to be shewn was, that a fiat had issued, and an adjudication taken place. This has been done. As to the ambiguity, it is shewn with sufficient certainty to which of the surrenders reference is made.

Cleasby replied. He referred to Watson v. Bodell (a); Brown v. Compton (b); Colston v. Ross (c); Anonymous case (d).

Cur. adv. vult.

Pollock, C. B., afterwards (e) delivered the judgment of the Court.

⁽a) 14 M. & W. 57.

⁽d) Salk. 273.

⁽b) 8 T. R. 424.

⁽e) In Hilary Vacation, 1849.

⁽c) Cro. Eliz. 893.

This was an action on the case against the sheriff for an escape.

The first count of the declaration states, that the plaintiff, having recovered a judgment against John Robinson and Thomas Turlay for 1319L, sued out a writ of ca. sa. thereon against them, directed to the sheriff of Yorkshire, and lodged the same with the defendant, the then sheriff, to be executed: that by virtue of that writ the defendant arrested the said John Robinson, and afterwards suffered him to escape.

The third count, after stating the judgment and the suing out and lodging of the ca. sa. with the defendant, proceeds to state, that before the writ was executed, a fiat in bankruptcy was issued against Robinson and Turlay, directed to the Leeds district Court of Bankruptcy, under which fiat Mr. Burge, then one of the Commissioners of the said district Court, adjudged the said Robinson and Turlay to be bankrupts; and that a duplicate of such adjudication having been served on each of them, the said Robinson and Turlay, Robinson surrendered to the fiat, and gave his consent in writing to the adjudication. then goes on to say, that after such surrender, but before the expiration of five days from the service of the said duplicate on each of them the said Robinson and Turlay, and before Turlay had surrendered or consented to the adjudication, the defendant, by virtue of the said writ of ca. sa., arrested the said Robinson; and afterwards, before the expiration of the said five days, discharged the said Robinson from custody. The third count contains other alleged breaches of duty on the part of the defendant, but they are not material to the present question.

The third plea which is pleaded to the first count only states that Robinson and Turlay, being co-partners in trade and subject to the bankrupt laws, filed each of them separate declarations of insolvency in the proper office, and afterwards petitioned the Lord Chancellor pursuant to the

1848.

NORTON U. WALKER NORTON U. WALKER.

statute, that he would issue a fiat of bankruptcy against them; and that thereupon the Lord Chancellor issued such fiat accordingly, and directed the same to the Leeds District Court of Bankruptcy, and that such Court thereupon, in due form of law, found and adjudged that the said Robinson and Turlay had become and were bankrupts, and each of them had become and was a bankrupt. plea then avers, that each of them the said Robinson and Turlay was, at the time of such adjudication, a bankrupt, and was duly adjudged to be so; and that thereupon a duplicate of the adjudication was served on each of them the said Robinson and Turlay, and that within five days after such service Robinson surrendered to the fiat, and gave his consent in writing that the adjudication might be advertised; and thereupon afterwards the Court appointed certain days for the said Robinson and Turlay to surrender and conform according to the statutes relating to bankrupts; and thereupon the said Court caused a summons in writing to be served personally on Robinson, by which, after reciting the fiat and adjudication, the Court did summon them personally to appear on certain specified days and make a full discovery and disclosure, &c. The plea then states, that, before the first of the specified days, Robinson did surrender and submit to be examined, but asked for further time, whereupon the Court gave him till the 26th of February then next, which said appointment of further time was then indorsed on the said summons, and signed by the commissioner. The plea then states, that in obedience to the writ of ca. sa., and before the expiration of five days from the service of the duplicate of the adjudication, and while Robinson was returning from his said surrender, the defendant caused him to be arrested, and thereupon Robinson produced the said summons so indorsed and gave a copy thereof to defendant, and requested to be discharged, and that defendant then and there forthwith discharged him accordingly, which is the escape complained of in the said first count.

The eighth plea is similar to the third, except that instead of justifying the escape by reason of the production of the indorsed summons, it only alleges the arrest to have been made while Robinson was reasonably returning from his surrender, and so privileged from arrest.

The seventh and ninth pleas set up similar defences to so much of the third count as relates to the escape.

To all these pleas the plaintiff has demurred specially; and the grounds of demurrer are, that the pleas do not disclose matter shewing that the Court of Bankruptcy had power to give to Robinson any valid protection against the plaintiff's arrest, and this on several grounds; first, because the flat is stated to have issued within two months next after the filing of the declaration of insolvency, and as two declarations are stated to have been filed, it does not distinctly appear that the fiat issued within the period fixed by the statute, and, unless it did so, there would be no act of bankruptcy sufficient to support the commission: secondly, the plea does not shew that Turlay had surrendered, and unless he had done so, the commissioner had no power to issue a summons to Robinson alone, and so that the statutory privilege did not exist. The pleas are founded on the 23rd section of the 5 & 6 Vict. c. 122. Lordship here read the section.

The substantial ground of defence relied on by the defendant is, that the officer, on production by Robinson of the summons fixing the 26th of February as the day for passing his final examination, and on his giving him a copy of that document, was bound to discharge him. There is no doubt but that Robinson was entitled to his discharge if he really had duly become bankrupt. But the plaintiff contends that the pleas do not disclose facts sufficient to shew a good and valid bankruptcy, and that unless there was a valid bankruptcy the sheriff was not warranted in discharging Robinson.

The pleas shew distinctly that Robinson was a trader

Norton v. Walker.

NORTON 9. WALKER. amenable to the bankrupt laws,—that a fiat issued against him, and that the Court to which the fiat was directed adjudicated him to be a bankrupt, and summoned him as such bankrupt to surrender and make a disclosure of his affairs; and by indorsement on the summons fixed the 26th of February as the day on which he was to come in and pass his final examination.

The third plea further states, that before the 26th of February had arrived, Robinson was arrested by the defendant on the plaintiff's writ, and was afterwards discharged on producing the summons and giving a copy to the officer.

In our view of this case it is not material to consider whether the bankruptcy was valid or not. A fiat had issued, under which Robinson had been, by the proper Court, declared to be a bankrupt, and we think that this was all which the sheriff was bound to inquire into. The question turns entirely on the 23rd section of the act 5 & 6 Vict. c. 122. The words are, "and if such bankrupt shall be arrested," &c., "he shall, on producing his summons," &c., "be immediately discharged." Here Robinson, after having been adjudged a bankrupt, was arrested, and did produce and give a copy of his summons as required by the statute, and he was certainly therefore entitled to be discharged, if he came within the description in the act of "such bankrupt." The real point is, what is the meaning of the words in the passage in question? Do they apply exclusively to persons who really are bankrupts, i. e., to traders who have committed an act of bankruptcy, and against whom a fiat has issued on a good petitioning creditor's debt, and who have thereupon been duly declared bankrupt? or do the words comprise all persons against whom a fiat has issued, and who have been thereupon, by the proper Court, adjudged to be bankrupt? We are of opinion that the latter is the proper construction. The remedy provided is one which admits of no delay. The party arrested is to produce his summons, and the sheriff is "immediately" to discharge him. The sheriff could not possibly obey this enactment if he were bound in the first instance, at his peril, to ascertain that his prisoner had been a trader, that he had committed an act of bankruptcy, that a fiat had issued on a valid and sufficient debt, and that he had been adjudicated a bankrupt thereon.

The ground on which the plaintiff rested his argument was, that however hardly this might press on the sheriff, still the language of the statute would admit no other construction, for the statute only says, if "such bankrupt" shall produce his summons, &c., the sheriff shall discharge him; and unless there have been all the requisites to support the fiat, the party arrested, it was argued, is not a bankrupt, and so not within the words of the enactment. But we think, that, without any violence to the language of the statute, the words "such bankrupt," may in this passage be taken to mean the party so adjudged bankrupt, bankrupt de facto, even though he be not bankrupt de jure. That this is not a forced or unreasonable construction is apparent from the very next section of the act, which enacts, that if the bankrupt shall not within a certain limited time proceed to dispute the fiat, then the Gazette containing the advertisement of his adjudication shall be conclusive evidence of his bankruptcy. Now, there the expression, "the bankrupt," clearly can only mean the party who has been adjudged bankrupt; for if it were taken to mean the party who has been in all respects duly adjudged a bankrupt, the provision as to his disputing his flat would be absurd. Considering, therefore, that the words in section 23, "such bankrupt" may, without violence to language, be taken to mean the party so adjudged bankrupt; that unless this construction be adopted, we must suppose the Legislature to have cast on the sheriff a duty which it is impossible for him safely to perform; and that in section 24, the word "bankrupt," has certainly the more extended meaning which we attribute to it in section 23; we are of opinion, that

NORTON

U.

WALKER

NORTON U. WALKER.

the defendant has established his justification, and is entitled to our judgment.

The view we have taken has made it unnecessary to inquire into the other points, namely, whether there were or were not all the requisites to sustain the bankruptcy.

Judgment for the Defendant.

REGINA v. MORSE.

The Court of Exchequer are always sitting to hear revenue matters. MAYNARD moved, during the Vacation Sittings after Term, that the report of the Queen's Remembrancer, bearing date the 8th day of November, 1848, approving of David Evans, George Sperratt, and William Spurrell as purchasers of certain premises sold under an extent, should be confirmed. A rule nisi had been obtained and served, and the present application was to make that rule absolute. He submitted, that as this was a matter connected with the revenue side of the Court, and as the Court was always sitting to hear revenue matters, he was entitled to make the application at the present time.

PER CURIAM. — Certainly. The rule must be made absolute.

Rule absolute.

1848.

WHITE v. GASCOIGNE.

LUSH moved for a rule, calling upon the defendant to The Court set shew cause why a plea in abatement pleaded by him in this action should not be set aside with costs, and why the plaintiff should not be at liberty to sign judgment.

The action was brought against the defendant and three affidavit in other persons, named Kirke Swann, Thomas North, and Samuel Parsons. The plea stated, that the debts in the declaration mentioned were contracted by him and the said Kirke Swann, Thomas North, and Samuel Parsons, jointly with sixty-three other persons named, that those persons were and are still living, and that each and every of them, before and at the time of the commencement of the action, resided and still do and doth reside within the jurisdiction The affidavit in verification of the plea of the Court. averred, that the plea was true in substance and in fact, and plea pleaded, and the affithat the said sixty-three persons therein named, at the time davit averred of the commencement of the suit, resided, &c. (respectively giving their places of residence,) within the jurisdiction of substance and in fact. the Court. It was now submitted that this affidavit was bad and not in compliance with the 3 & 4 Wm. 4, c. 42, It stated merely the residence of the parties whose nonjoinder was complained of at the time of the commencement of the suit, whereas it ought also to have shewn their place of residence at the period when the plea was pleaded.

A rule nisi having been granted,

G. T. White shewed cause. It is submitted that both the plea and affidavit are sufficient to satisfy the provisions of the 3 & 4 Wm. 4, c. 42, s. 8. The words of that section are, "That no plea in abatement for the nonjoinder of any person as a co-defendant shall be allowed in any Court of common law, unless it shall be stated in such plea that such person is resident within the jurisdiction of the Court; and unless the place of residence of such person shall be stated

aside a plea in abatement for non joinder of co-defendants with costs, where the verification of the plea stated the residence of the parties at the time of the commencement of the suit only, and not at the time of the plea pleaded; although the plea stated the residence at the time of that the plea

WHITE 9.
GASCOIGNE.

with convenient certainty in an affidavit verifying such plea." Now the plea, which was drawn on the authority of and according to the precedent given by Mr. Serjt. Stephen, one of the commissioners on whose report the act was founded, alleges that the parties "were and still are resident within the jurisdiction of the Court." By it, therefore, the first requirement of the 8th section is clearly satisfied. [Parke, B.—They do not dispute the validity of the plea: their objection is to the merits of the affidavit]. The affidavit is also good. The expressions used in the latter part of the 8th section are not that "such residence of the said person;" but that "the place of residence of such person" shall be given. This is amply complied with. The affidavit states that the plea is true in substance and fact; and also verifies what will be intended to be a material fact contained in the plea, viz., that at the commencement of the suit the parties resided within the jurisdiction of the Court. And if this be considered as a material fact, it will be presumed to have continued to exist until the contrary be shewn. In Starkie on Evidence, vol. 3, p. 937, 3rd ed., it is laid down, that "when the existence of a particular subject-matter or relation has once been proved, its continuance is presumed, till proof be given to the contrary, or till a different presumption be afforded by the very nature of the subject-matter." And as instances, the cases of the existence of partnership, duration of life, &c., are given. If, therefore, the parties had ceased to reside within the jurisdiction of the Court at the time when the plea was pleaded, that circumstance should have been proved by an affidavit from the other side. [Parke, B.—This is not matter of inference. The act of Parliament requires that the residence of the parties at the time when the plea was pleaded should be stated. Pollock, C. B. - The rule laid down by Mr. Starkie is not applicable to affidavits. But supposing that the affidavit should be holden to be defective, and that the rule should be made absolute for setting aside the plea; still it is submitted that the plaintiff is not entitled to ask for costs;

Poole v. Pembrey (a). In that case it was decided, that neither party had a right to costs, on a plea of abatement; and that the plaintiff, on setting aside such a plea for irregularity, was not entitled to ask for them.

1848. WHITE GASCOIGNE.

Lush, in support of the rule. That case was decided before the passing of the statute.

PER CURIAM (b).—The rule must be made absolute for setting aside the plea with costs; the defendant to have liberty to plead issuably within ten days.

Rule absolute.

- (a) 1 Dowl. 693.
- (b) Pollock, C. B., Parke, B., Alderson, B., and Rolfe, B.

CHAPLIN and Another v. SHOWLER.

G. POLLOCK had obtained a rule, calling upon the A summons plaintiffs to shew cause why the declaration in this case and all subsequent proceedings should not be set aside for irregularity.

It appeared upon the affidavits, that on the 20th of July, 1847, a writ of summons was issued, and the defendant to set aside duly served therewith. On the 7th of August, 1848, a notice of declaration was left at the defendant's residence. On the 11th of August, a summons was served upon the plaintiffs, calling on them to shew cause why the declaration had elapsed should not be set aside, on the ground that more than "four since the writ Terms" had elapsed since the writ of summons had been had been

was taken out by the de-fendant on the 14th of August, 1848, before a learned Judge at Chambers a declaration for irregularity, on the ground that more than served. learned Judge

dismissed the application, on the ground that the reason assigned was insufficient; the rule being that a declaration should be filed not within "four Terms," but within a "year" of the service of the writ of summons. The defendant having afterwards obtained a rule before the full Court, for the same purpose, in the Michaelmas Term following; Held, that the decision of the learned Judge was correct, and that the application came too late.

CHAPLIN and Another Showles.

served. On the 14th of the same month, it was attended before Alderson, B., by whom it was dismissed, on the ground that the reason assigned for setting aside the declaration was insufficient, the rule being (a), that a declaration should be filed, not within "four Terms," but within "one year" of the service of the writ of summons. On the 29th of October, a similar application to the present was made to Platt, B., who declined to interfere.

Burchell now shewed cause. This motion is either an appeal from the decision of Alderson, B., or it is a fresh application. If it be considered as an appeal, then it is bad, for the learned Judge was quite right in the conclusion at which he arrived. If it be regarded as a fresh application, then it comes too late.

G. Pollock, in support of the rule, contended, that the application made at Chambers and the present motion were substantially the same, and that the defendant had been guilty of no unreasonable delay.

Pollock, C. B.—I am of opinion that this rule should be discharged. In complaining of an irregularity the party seeking to set the proceedings aside should shew that he himself has been perfectly regular. In the present instance this has not been done. On the 14th of August, an application was made to my Brother Alderson to set aside the declaration, on the ground that more than "four Terms" had elapsed since the writ of summons had been served. This was manifestly incorrect, and he was therefore quite right in dismissing the summons. Subsequently the defendant waits for an unreasonable time, and then comes to the Court with what must be considered as a new application.

(a) Reg. Gen., Hil. Term, 2 Wm. 4, r. 35. "A plaintiff shall be deemed out of Court unless

he declare within one year after the process is returnable."

ALDERSON, B.—I think, if the defendant had come before me on the 15th of August, and with a fresh application, I should not have refused it.

1848. CHAPLIN and Another SHOWLER.

PARKE, B., and PLATT, B., concurred.

Rule discharged, with costs.

STRATTON v. MATTHEWS.

MARTIN moved for a rule, calling upon the plaintiff An affidavit to shew cause why the order of Alderson, B., to hold the to bail, stated defendant to bail, should not be rescinded for irregularity, on the ground that no debt or other sufficient cause for holding the defendant to special bail was sworn to in the the plaintiff affidavit on which such order was obtained; and why the writ of capias issued in pursuance of such order should not be set aside for the same irregularity.

The order had been obtained on the 16th of August, 1848; amount of the and the affidavit on which it was granted, and which was that of the plaintiff and a person named Edward Harbord brought Brace, stated, "that the defendant was and still is justly by the indorsee of a bill of and duly indebted to the plaintiff in the sum of 337L, that is to say, the sum of 267L 16s. being the amount of debt, and 69L being the amount of costs, respectively paid by the plaintiff to Messrs. Cockburn & Co., of No. 5, White-the accomhall, Bankers, in a certain action in which the said Messrs. modation or the defendant, Cockburn & Co. were plaintiffs, and the deponent defend- on his request, ant, on a certain bill of exchange, drawn by the said E. H. through the Brace on and accepted by this deponent, on the request of or his clerk: the defendant conveyed through the said E. H. Brace or Held, that the affidavit was his clerk, and for the accommodation of the said defendant sufficient. and other persons; he, this deponent, never having received any value or consideration for such acceptance; and which said bill was subsequently indorsed and delivered by the

that the defendant was and still is indebted to in the sum of 3371., part of which being the amount of the debt and part the costs paid in an action exchange, E. H. B. which he had conveyed

STRATTON v.
MATTHEWS.

said E. H. Brace to the defendant, who thereupon caused the same bill to be discounted at the said Messrs. Cockburn & Co., and received value for it, as this deponent hath been informed and verily believes." It was now contended that the above affidavit did not shew with sufficient clearness that the defendant was liable to pay the debt claimed.

PARKE, B.—In Jones v. Brooke (a), which was an action against the acceptor of an accommodation bill, it was holden that the drawer was not a competent witness, inasmuch as the acceptor was entitled to recover against him both the amount of the bill and also all the costs he might have incurred. Here, therefore, the plaintiff discloses a good cause of action against the defendant for a sum made up of the amount of the bill which he accepted for his accommodation, and the costs of the former action.

PER CURIAM.

Rule refused.

(a) 4 Taunt. 464.

Howard and Another, Executors of John Milling v. RICHARD OAKES.

Declaration in assumpsit by the executors of J. M. on a promissory note for 60L, dated the 30th ASSUMPSIT. The first count of the declaration stated that the defendant, in the lifetime of the said John Milling, to wit, on the 30th of March, 1835, made his promissory note in writing, and thereby promised to pay to the said

of March, 1835, made in the lifetime of the said J. M. by the defendant, and payable to J. M. six months after notice. Plea, that the said note was and is made payable to one Elizabeth Milling, who at the time of making the said note was the wife of the said J. M., and that the said note was so made payable to her by her then name of E. Milling, with the consent of the said J. M., her husband; and that the said note was not, nor is otherwise than as aforesaid, payable to the said J. M.; that the said J. M. did not in the lifetime of his said wife, who died in the lifetime of the said J. M., do any act to reduce the said note into possession, nor did he ever in the lifetime of his said wife, reduce the said note into possession. *Held*, on special demurrer, that the plea was bad, as amounting to an argumentative denial of the making of the note to J. M.

J. Milling or order, the sum of 60L for value received six months after notice to pay the same, and then delivered the said note to the said John Milling; that afterwards, to wit, on the day and year aforesaid, the said John Milling gave notice to the defendant to pay the said sum of 60L, according to the tenor and effect of the said note, and that the period in and by the said note appointed for payment thereof, to wit, the space of six months after the said notice elapsed, in the lifetime of the said John Milling; and thereupon the defendant, in the lifetime of the said John Milling, and when the said note had become due and payable as aforesaid, according to the tenor and effect thereof, and whilst the said note still remained due and payable, to wit, on the 1st of January, 1836, promised the said J. Milling, in consideration of the premises, to pay him the said sum of money in the said note specified, on request.

There was also a count stating a promise to pay the plaintiffs as executors.

Plea to the first count, that the said promissory note therein mentioned was and is made payable to one Elizabeth Milling, who at the time of making the said note was the wife of the said John Milling; and that the said note was so made payable to her by her then name of E. Milling, with the consent of the said John Milling, her husband; and that the said note was not, nor is otherwise than as aforesaid, payable to the said John Milling. And the defendant further says, that the said J. Milling did not, in the lifetime of his said wife E. Milling, who died in the lifetime of the said J. Milling, do any act to reduce the same into possession, nor did he even, in the lifetime of his said wife, reduce the same into possession. Verification.

There was also a similar plea to the other count.

The plaintiffs demurred specially to both pleas, on the ground that they amounted to a denial of the making of the notes; that they informally, circuitously, and indirectly

Howard and Another v. Oakes.

Howard and Another v. Oakes.

denied such making; and that they did not sufficiently traverse, or confess and avoid the matters stated in the various counts.

Joinders in demurrer.

J. Henderson, in support of the demurrers. The pleas are bad, inasmuch as they amount to an argumentative denial of the making of the notes declared on. They disclose a contract different from that set forth in the first and second counts. The contract stated in the pleas is to pay the wife. During her husband's lifetime she might have sued on the note so describing it, and the fact of her marriage would only have sustained a plea in abatement, and not one in bar; Bendix v. Wakeman (a). It is said, that in pleading, a note made payable to wife in form, may be described as payable to the husband in fact. true only where in legal effect the promise enures to him; Arnold v. Revoult (b). In Philliskirk v. Pluckwell (c), it was decided that the wife might be joined with the husband in an action on a note made payable to her during cover-In M'Neilage v. Holloway (d), it was holden indeed that the husband might sue alone, but that case was founded on the doctrine that bills and notes are chattels personal, and has been overruled by Gaters v. Madeley (e). cases collected in Sherrington v. Yates (f) shew that a promissory note made to a wife during marriage, primâ facie enures to her. The pleas are also defective for not confessing and avoiding, and giving colour.

Crompton, in support of the pleas. The pleas are good. The defence raised by them could not have been given in evidence under a plea of non fecit, and they give a

⁽a) 12 M. & W. 97; S. C. (d) 1 B. & A. 218.

ante, vol. 1, p. 450. (e) 6 M. & W. 423.

(b) 1 B. & B. 443; S. C. 4 (f) 12 M. & W. 855; S. C.

Moore, 66. ante, vol. 1, p. 1032.

⁽c) 2 M. & S. 393.

1848.

HOWARD and Another

OAKES.

It is an established rule, that sufficient implied colour. whenever a note or deed is given to a wife during coverture, the husband may treat it as given to himself; Arnould v. Revoult (a). There Richardson, J., says, "I think this is no variance, and I rely principally on the case in the second Modern Reports. There it was held, that the husband might refuse as to his wife and sue alone, she may do the This is no more a variance than in the case of same here. bonds and promissory notes, when they are made to the wife, and declared on as made to the husband, which has always been held allowable;" Beaver v. Lane (b); Anherstein v. Clarke (c). Again it is settled, that upon the death of the husband the remedy on a bill or note given to the wife during coverture survives to her, unless something has been done by him to reduce it into possession; Scarpellini v. Atcheson (d). The pleas, therefore, sufficiently confess and avoid. But admitting that they amount to a traverse, still they will be holden to be valid. Where matters of fact are intermixed with matters of law, they may be specially pleaded; Hussey v. Jacob (e). The pleas also give a good colourable title; Unwin v. St. Quintin (f).

J. Henderson was heard in reply.

Cur. adv. vult.

PARKE, B., now delivered the judgment of the Court (g).— This case was argued before us a few days ago by Mr. Henderson and Mr. Crompton. (His Lordship here read the pleadings.) If there be a note made to a feme covert during coverture, it is clear that the husband may sue alone upon it, or permit his wife to take an interest in it; in which latter case it appears to stand on the same footing

⁽a) 1 B. & B. 443, 6.

⁽b) 2 Mod. 217.

⁽c) 4 T. R. 616.

⁽d) 7 Q. B. 864.

⁽e) 1 Ld. Raym. 87.

⁽f) 11 M. & W. 277; S. C.

² Dowl. 790, N.S.

⁽g) In the Vacation after M1-

chaelmas Term.

Howard and Another v. Oakes.

as if it had been made to her before coverture. The facts stated in the two pleas amount therefore to a good defence to the action. The only question is whether they are properly pleaded without a traverse of the alleged making of the note to the husband. We think they are not; and that the cause of special demurrer is well assigned. If the allegation in the declaration that the note was made payable to the husband, could only be proved by evidence that the note was made to him by name, the allegations in the plea are clearly inconsistent with that fact, and amount to an argumentative denial of it. But it is said that the husband may not only sue alone on a note to her made during coverture, but may treat it in pleading as made to himself; and for this the authority of the late Mr. Justice Richardson (a very great one) is cited, from the case of Arnould v. Revoult (a). The case itself was that of an action by a husband alone, on a covenant with him and his wife during coverture, and was like that of Anherstein v. Clarke (b), and the cases there cited, where it was held that the husband may refuse, quoad the wife, and sue alone, and describe the bond as made to himself; but the dictum of that very learned Judge goes further, and applies to the present case; and in Burrough v. Moss (c), the note was sued on as made to the husband in the name of the wife. Assuming that the husband may describe the note as made to himself where he himself sues, and by so doing indicates an intention that the wife shall have no interest in the note, and himself the whole; and admitting in such a case that it may be described as made to him in point of law; it cannot be so described when he has authorized the note to be made payable to the wife by name; and therefore, the pleas are equally inconsistent with, and an argumentative denial of, the allegation that the note was made to him in point of law. So that, if the allegation be understood to mean that the note was made payable to the husband in fact or in law,

⁽a) 1 B. & B. 446.

⁽c) 10 B. & C. 558.

⁽b) 4 T. R. 616.

the plea is equally an argumentative traverse. Mr. Crompton, however, argued that the statement that the note was made payable to the wife with the husband's consent, gave a sufficient implied colour of title to the husband as payee of the note, which the plea confessed and avoided. do not agree in this; the plea does not admit that the husband was payee of the note in any sense. contrary, the defendant's case is, that although the plea says the husband was the payee, he never was such in fact The defendant may amend on the usual terms, if he thinks fit; but it will be unnecessary, if there be a plea denying the making of the note.

1848. HOWARD and Another OAKES.

Judgment for the Plaintiff.

BOWEN v. WILLIAMS.

OGLE moved (a) for a rule, to shew cause why an order By an order made by Williams, J., in this case should not be rescinded, Judge, a cause and why the award made in favour of the plaintiff should not two arbitrators, The application was made on the part of the and in the executors of the defendant, and it appeared from the affidavit disagreeing. that an action had been commenced on the 31st of August, 1846, for the sum of 50L On the 20th of January, 1848, it examine the was referred to arbitration, under an order of Pollock, C. B. suit. The By this order it was provided, that the cause should be making the referred "to the final end and determination of A. J. Curaward was the 20th of April.

(a) On the last day but two of Term.

of a learned event of their to an umpire. day fixed for That period was subsequently enlarged by consent to the

10th of October. On the 24th of July, the defendant died. On the 17th of October, by an order of a Judge, the time limited for the arbitrators to make their award was extended to the 7th of November. The umpire, on the 6th of November, made an award in favour of the plaintiff. On motion made on the last day but two of Michaelmas Term to set aside the Judge's order for enlarging the time: Held, too late.

Semble, that the Judge had the power to make the order of enlargement, notwithstanding the

time for making the award had expired, and one of the parties to the submission had died.

Semble also, that the award, though made by the compire, was valid.

Bowen

WILLIAMS.

wood, and J. Williams, and in the event of their not agreeing, to the umpirage of T. Morgan; so as they or he should make their award in writing of and concerning the matters referred, ready to be delivered to the said parties in difference, or such of them as shall require the same, or to their respective personal representatives, if either of the said parties should die before the making of such award, on or before the 20th of April then next ensuing; and that the said arbitrators or umpire should be at liberty, if they or he should so think fit, to examine the parties to the suit, and their respective witnesses upon oath or affirmation, and that they should produce before the said arbitrators or umpire, all books, deeds, papers, and writings in his or their custody or power relating to the matters in difference." On the 17th of April, the time for making the award was enlarged by consent to the 10th of October. On the 24th of July, the defendant died. At one of the meetings held before the 24th of July, the plaintiff was examined, but the defendant never was examined. On the 6th of October, a summons was served on the defendant's attorney, to further enlarge the time for making the award, until the 10th of November. On the 17th of October, it was attended before Williams, J., when, notwithstanding the opposition made on the ground of the death of the defendant, and that his executors were thereby deprived of the benefit of his evidence, and on the further ground, that there had been ample time to make the award before his demise; the learned Judge made the following order:-

"Bowen v. Williams. Upon hearing the attorneys or agents on both sides, I do order that the time limited for the arbitrators to make their award herein be further enlarged till the 7th of November next.

E. V. WILLIAMS."

The *umpire* made his award on the 6th of November, whereby he found that the plaintiff was entitled to recover

from the defendant, his executors or administrators, the sum of 431 10s. It was now submitted, first, that the time for making the award having expired, the learned Judge had no power to enlarge it, and that, therefore, his order was bad. [Parke, B.—There are cases to the contrary. In Parbery v. Newnham (a), it was holden that the Court had power under 3 & 4 Wm. 4, c. 42, s. 39, to enlarge the time for an arbitrator to make his award, where the arbitrator, having the power to enlarge the time limited by the submission for making his award, had allowed the time to elapse without doing so. He also referred to Leslie v. Richardson (b)]. In Lambert v. Hutchinson (c), the Court refused to interfere where the arbitrator had inadvertently omitted to enlarge the time for making his award. In Parbery v. Newnham, there was no power to examine the parties. Here the reference was of a cause, and one of the parties having died, no such cause exists. If the order had been made before the expiration of the time fixed, the death of the defendant would probably not have put an end to it. [Alderson, B.—It is the same thing. The clause in the submission respecting the personal representatives provides for that].

POLLOCE, C. B.—I do not think that we ought to accede to your application. The utmost that we can do is not to enforce the award by attachment, but leave the opposite party to bring their action when you can raise the objection.

PARKE, B.—You should have made your application at an earlier period. That the Court have the power of enlarging the time for making an award after the period originally fixed has expired, is clearly settled; Parbery v. Newnham (a); Leslie v. Richardson (b). This being a

Bowen v. WILLIAMS.

⁽a) 7 M. & W. 378; S. C. (c) 2 M. & G. 858; S. C. 3 9 Dowl. 288. Scott, N. R. 221.

⁽b) Since reported, ante, p. 91.

Bowen

Bowen

B.

WILLIAMS.

reference in the cause of *Bowen* v. Williams, I am not quite certain that the order is not affected by the death of one of the parties. At all events you have come too late.

Ogle. The award at any rate is bad. Throughout the earlier portion of the proceedings, the arbitrators and umpire are treated as perfectly distinct. On appearing before the Judge they come to a fresh agreement, to be bound by the award of the arbitrators, throwing aside the umpire. The award, therefore, having been made by the umpire, is contrary to the order, and becomes a nullity.

ALDERSON, B.—Surely the order of the Judge must receive a reasonable construction, and the word "arbitrators" be taken to mean the parties who are to arbitrate.

PER CURIAM (a).

Rule refused.

(a) Pollock, C. B., Parke, B., Alderson, B., and Rolfe, B.

SOAMES and Another v. Cooper.

The Court will not grant leave to enter a suggestion on the roll to deprive a plaintiff of costs under the 9 & 10 Vict. c. 95, s. 129, after judgment and execution, and while the judgment is still subsisting. The proper

REW had obtained a rule calling upon the plaintiffs in this action to shew cause why they should not bring the writ of trial into Court and file the plea roll, so that the defendant might enter a suggestion thereon to deprive the plaintiffs of costs, pursuant to the statute 9 & 10 Vict. c. 95, s. 129, intituled "An Act for the more easy recovery of Small Debts and Demands in England;" and why the judgment should not be entered up in conformity thereto, and satisfaction entered; and why the sum of 181 10s.,

course to pursue is to move to set aside the judgment and execution, and then to enter a suggestion.



paid by the defendant to the officer of the sheriff of Surrey for costs in this action, should not be refunded by the said plaintiffs to the defendant. SOAMES and Another v. COOPER.

From the affidavits it appeared, that the action had been brought for 12L 11s. for goods sold and delivered; that on the 27th of July, the case came on for trial before the undersheriff of Middlesex, when a verdict was found for the plaintiffs for 8L 15s. 8d. The affidavits stated that the plaintiffs do not, nor did, at the commencement of the suit, dwell twenty miles from the defendant; that the cause of action arose wholly within the jurisdiction of the Court within which the defendant dwells and carries on his business, viz., within the jurisdiction of the County Court of Wandsworth; and that the defendant was not an officer of the said County Court or of any County Court whatever, nor are the plaintiffs officers or an officer of the said Court.

On the 28th of July, an application had been made to Alderson, B., for permission to enter a suggestion on the roll to deprive the plaintiffs of costs; but was dismissed, on the ground that the affidavit did not allege that the defendant was not an officer of the County Court. defendant on the same day paid to the plaintiffs' attorney the sum of 8L 15s. 8d., being the amount of the debt. Notice of taxation of costs was given for the 29th, when the defendant attended and protested against the taxation being proceeded with, on the ground that the plaintiffs were prevented by the act of Parliament from claiming The Master refused to enter into the question and taxed the costs at 13l. 10s. 2d. An execution was subsequently put into the defendant's house, when he paid the amount under protest, together with the costs demanded by the sheriff. The defendant afterwards searched at the office, and found that judgment had been signed for 81. 15s. 8d., a blank being left for the amount of costs, but that no judgment roll, or any roll or record whatever, in the action, had been carried in.

SOAMES and Another v. Coorer.

Lush shewed cause. The defendant is irregular in the course he has adopted. In this case judgment has been signed, the costs taxed, execution issued, and the amount of the costs paid; and now the defendant asks to be allowed to enter a suggestion on the roll to deprive the plaintiffs of those costs. This he cannot do. The entry of a suggestion to deprive a party of costs after the costs have been taxed, is a nullity.

Rew, in support of the rule. The objection raised on the other side is futile. The affidavit states that a search was made at the office, and that judgment was found to have been signed, but a blank left for the costs. The judgment, therefore, was perfectly regular, and no objection could be taken to it. The subsequent taxation and payment of the costs were made under protest on the part of the defendant. What the defendant now seeks is, that a suggestion be entered on the roll to deprive the plaintiffs of their costs.

PARKE, B.—Your application in its present form comes too late. A suggestion cannot be entered on the roll after judgment has been signed and execution issued, and while the judgment is still subsisting. You should have moved to set aside the judgment and execution, and then, to enter a suggestion.

Pollock, C. B., Alderson, B., and Platt, B., concurred.

Rule discharged.

COURT OF QUEEN'S BENCH.

Michaelmas Cerm.

IN THE TWELFTH YEAR OF THE REIGN OF VICTORIA.

GRANDIN v. MADDAMS.

THIS was a rule calling upon the plaintiff to shew cause After a writ why the judgment signed herein should not be set aside, of summons and why an order of Mr. Baron Alderson, dated 18th of Judge's order August, 1848, should not be rescinded.

The following facts appeared upon the affidavits. the 7th of July, 1848, a writ of summons was issued and made by consent. Default served upon the defendant, who, on the 17th of July, having been consented to a Judge's order for payment of the debt and plaintiff, withcosts by instalments, or in default for the plaintiff to be at out entering an appearance liberty to sign judgment. On the 12th of August, default for the dehaving been made, the plaintiff accordingly signed judg- judgment and ment; but without having previously entered an appearance tax his costs.

1848.

for payment of debt and On costs by in-stalments was fendant, signed The bill of costs contained

no charge for entering an appearance. The defendant attended the taxation, and asked for, and obtained, further time for payment. *Held*, on motion to set aside the judgment, on the ground that no appearance had been entered, that the defect was an irregularity merely, and sot a nullity; and that the defendant had waived it, by attending the taxation and asking for further time to make the payment.

Quare, whether the decision in Thompson v. Becke (a) can be maintained to its full extent? (a) 4 Q. B. 759.

D. & L.

VOL. VI.

GRANDIN v. MADDAMS.

for the defendant. On the 14th, notice of taxation of costs was given; and the taxation was attended, on the 17th, by the defendant, who asked for time to pay the debt and costs, which was acceded to by the plaintiff's attorney. The bill of costs, produced before the Master on the taxation, contained no charge for entering an appearance. On the 18th, a summons was taken out to set aside the judgment, which was heard before Mr. Baron Alderson at Chambers, who dismissed it. On the 19th, a second summons to the same effect was taken out, which was heard before the same learned Baron on the 21st, and also dismissed. In the affidavits in answer to the rule, it was stated, that the ground on which Mr. Baron Alderson dismissed both summonses was, that the defendant having attended the taxation of costs of judgment, after bill delivered with no entry of appearance, and having subsequently applied for and obtained further time for payment, had waived any advantage he might otherwise have taken, of the fact of no appearance being entered.

Wood shewed cause. There is a preliminary objection to the present proceeding. When a party goes before a Judge at Chambers, who decides against him, he may appeal from that decision either to the Court or to the Judge himself; but after having once appealed to the Judge himself, he cannot come to the Court to review his decision. The case of Thompson v. Becke (a) is in point. There, a Judge at Chambers had dismissed a summons with costs. The unsuccessful party paid the costs, but immediately afterwards applied to the Judge on further summons to rescind the order. The Judge, learning from the affidavits that the costs had been paid, dismissed the application as made too late. On motion to the Court, to rescind the first order, it was held that the parties having appealed to the Judge who made the order, were bound

by his decision, and could not make a further appeal to the Court. The case of *In re Stretton* (a), which will probably be relied on by the other side, where a party, notwithstanding a second application to a Judge, was allowed to come to the Court, does not shake the authority of the first cited case; as there, the second application to the Judge was not by way of reversal of his former decision.

GRANDIN

B.

MADDAMS.

Pearson, contrà. The case of In re Stretton shews, that it is only where the parties have by special agreement placed the Judge in the position of the Court to decide the point, that they are precluded from afterwards appealing to the Court to review his decision. If Thompson v. Becke be taken to decide any more than this, it is submitted that that decision cannot be upheld; and indeed, upon referring to the language of the Court in that case, it seems probable that no more was intended to be decided. Besides, here the defect complained of renders the judgment a nullity, and therefore the Court, in mercy even to the other side, will not refuse to set aside the proceedings at this stage. In Thompson v. Becke the defect was a mere irregularity.

PATTESON, J.—I will consider whether I will hear the case further.

Cur. adv. vult.

On a subsequent day,

PATTESON, J.—The case of *Thompson* v. *Becke*, which has been relied on in support of the preliminary objections, is not quite like the present; and as there seems to be some doubt about the propriety of that decision, I think I had better hear the whole case.

(a) 14 M. & W. 806; S. C. ante, vol. 3, p. 278.

GRANDIN
v.
MADDAMS.

Wood. The defect complained of in this case is not a nullity; but an irregularity merely, and may be waived by lapse of time. In Hackin v. Hassells (a) it was expressly decided, that the omission to enter an appearance for a defendant before judgment is signed, in pursuance of a Judge's order, does not render the judgment a nullity, but is a mere irregularity and cured by lapse of time (b). So in Williams v. Strahan (c), where the defendant had accepted a declaration, and had acted as if an appearance had been entered for him, the Court of Common Pleas refused to permit him to set aside a judgment, on the ground that no appearance had been entered. If, then, this is a question of mere irregularity, the case of Tadman v. Wood (d) shews that whether the party complaining of it has come in time, is a question for the discretion of the Judge at Chambers, and with which this Court, when he has once pronounced his decision, will not interfere. The plaintiff has an affidavit that Mr. Baron Alderson decided that question, and held that the defendant came too late.

Pearson, in support of the rule. The signing judgment without an appearance being entered is not a mere irregularity, but a nullity. The case of Roberts v. Spurr (e) is an express authority to that effect. There, Mr. Justice Williams says, "There being no person before the Court against whom judgment can be signed, the present judgment must be a nullity." That case was cited in Hackin v. Hassells, but was not alluded to in the judgment by Mr. Baron Parke. In the present case, it does not appear that the application for further time was made after the want of an appearance was known; and the case of Archer

⁽a) Ante, vol. 1, p. 1006; S. C. div. nom. 12 M. & W. 776.

⁽c) 1 N. R. 309.

⁽d) 4 A. & E. 1011.

⁽b) See Charlesworth v. Ellis,

⁽e) 3 Dowl. 551.

⁷ Q. B. 678.

v. Garrard (a) shews, that merely attending the taxation of costs is no waiver of an irregularity. [He referred also to Watson v. Dore (b); Richardson v. Daly (c); and Stephens v. Lorondes (d).]

GRANDIN

O.

MADDAMS.

PATTESON, J.—The case of Roberts v. Spurr is, no doubt, a very strong authority to shew that a judgment signed without an appearance is a nullity, and not an irregularity merely. But then there is a subsequent decision of Hackin v. Hassells, in which the Court of Exchequer treat the want of an entry of an appearance as an irregularity only. That case is very similar to the There, a Judge's order had been obtained for payment of debt and costs; and it was sought to set it aside on the ground that no appearance had been entered; and the Court held that it was an irregularity only, and might be waived by lapse of time. That is the last case on the subject, and therefore I think I must be bound by it. earlier case of Williams v. Strahan is to the same effect, and does not appear to have been referred to in Roberts v. Spurr.

Then comes the question of whether or not there has been a waiver of the irregularity by attending the taxation, and asking for and obtaining further time for payment of the debt and costs; for I think I must assume upon these facts, that the omission in the bill of costs of any charge for entering an appearance, was notice to the defendant, and that he must therefore be taken to have had knowledge of the irregularity. The case of Archer v. Garrard, which has been cited, has no application; as there the defect complained of was signing a judgment which was clearly a nullity, as the grounds upon which it was signed, did

⁽a) 6 Dowl. 132; S. C. 3 M. (c) 4 M. & W. 384; S. C. & W. 63. 7 Dowl. 25.

⁽b) 2 M. & W. 386; S. C. (d) Ante, vol. 3, p. 205. 5 Dowl. 584.

GRANDIN

MADDAMS.

not in point of fact exist. The present defect, therefore, being an irregularity merely, I am of opinion it has been waived by appearing at the taxation and asking for time for payment of the debt.

The rule must, consequently, be discharged; and in arriving at this conclusion, I do so independently altogether of how far the case of *Thompson* v. *Becke* (a) is to be considered as rightly decided, respecting which I wish to be considered as pronouncing no opinion.

Rule discharged.

(a) 4 Q. B. 759.

ROBINSON v. LITTLE.

(In the full Court).

To a declaration by indorsee against acceptor of a bill of exchange, the defendant pleaded in substance that the bill was accepted for the accommodation of the drawer, upon the terms that he should pay it when due, and that if he should

DECLARATION in assumpsit by indorsee against acceptor of a bill of exchange, drawn by one J. Dickinson.

Sixth plea. That the said bill of exchange was, at the time in the first count mentioned, accepted by the defendant for the accommodation of the said J. Dickinson, and without any consideration for the payment thereof; and at the time of the accepting of the said bill it was agreed by and between the said J. Dickinson and the defendant, that the said J. Dickinson should hold the said bill upon the terms that the said J. Dickinson should take up and pay

negotiate it, or part with it to any holder, such holder should deliver it to him, the drawer, before or when it became due, to enable him to take it up, and should not retain it after it became due; that the drawer indorsed the bill to the plaintiff with notice of these facts, and that the plaintiff received and always held the bill on the above terms, and retained it, contrary to the said terms: *Held*, on special demurrer, that de injurià was a good replication to this plea.

the said bill of exchange when the same should fall due, and that if the said J. Dickinson should negotiate or part with the same to any holder whomsoever, such holder should deliver the same to the said J. Dickinson before or at the time when the same should become due, to enable the said J. Dickinson to take up and pay the same to such holder, and that the said bill should not be retained by any holder thereof after the same had become due. And thereupon the defendant, to wit, at the time aforesaid, delivered the said bill to the said J. Dickinson on the terms aforesaid, and he then received the same on such terms, and hath never held the same on any other terms. And thereupon afterwards, and before the commencement of this suit, to wit, on, &c., the said J. Dickinson indorsed the said bill to the plaintiff, and the plaintiff then had notice of the premises, and then received and hath always held the said bill upon the terms aforesaid; and after the said bill became due, and before the commencement of this suit, held and retained, and still holds and retains the same, and sues thereupon in this action, contrary to the said terms, which is the same indorsement in the said first count mentioned. Verification.

Replication de injuriâ.

Special demurrer, alleging for grounds, that the sixth plea amounts to a denial of the indorsement alleged in the first count, and is a plea in discharge and not in excuse; that the replication is multifarious, and contains too large a traverse; and that the replication is in the negative only, and contains no affirmative denial of the negative allegations in the said sixth plea.

Joinder in demurrer.

Hugh Hill, in support of the demurrer.

Hance, contrà.

The following authorities were referred to. Evans v.

ROBINSON 5.
LITTLE.

ROBINSON v.
LITTLE.

Kymer (a); Isaac v. Farrar (b); Basan v. Arnold (c); Humphreys v. O'Connell (d); Marston v. Allen (e); Schild v. Kilpin (f); Adams v. Jones (g); Cowper v. Garbett (h); Jones v. Corbett (i); Hayes v. Caulfield (k); Mortimer v. Gell (l); Lansdale v. Clarke (m); Washbourn v. Burrows (n); Bennett v. Bull (o).

Cur. adv. vult.

Afterwards, in the Vacation after Michaelmas Term, Lord Denman, C. J., delivered the judgment of the Court (p). We are of opinion that the replication de injuriâ in this case is good.

The declaration is by the indorsee against the acceptor of a bill of exchange, and is in the usual form. The plea states in substance that the bill was accepted for the accommodation of the drawer, who undertook to pay it when due. It then states that the drawer indorsed the bill to the plaintiff, with notice, and that the plaintiff received and always held the bill on the above terms.

The question is, whether the plea shews an excuse for non-payment, or amounts to an argumentative denial of the indorsement by the drawer to the plaintiff.

The cases of Adams v. Jones (g), and Marston v. Allen (e), were much relied on by the defendant, but they are distinguishable from the present. In both those cases the

```
(a) 1 B. & Ad. 528.

(b) 1 M. & W. 65; S. C. 4

Dowl. 750.

(c) 6 M. & W. 559; S. C.

8 Dowl. 356.

(d) 7 M. & W. 370; S. C.

9 Dowl. 213.

(e) 8 M. & W. 494; S. C.

1 Dowl. 442, N. S.

(f) 8 M. & W. 673; S. C.

9 Dowl. 803. See Tibaldi v.

Ellerman, ante, p. 71.

(g) 12 A. & E. 455; S. C.

4 P. & D. 174.
```

- (h) 13 M. & W. 33; S. C. ante, vol. 1, p. 969.
- (i) 2 Q. B. 828; S. C. 2 G.
- & D. 308.
 - (k) 5 Q. B. 81.
 - (l) 4 C. B. 543.
- (m) 1 Exch. 78; S. C. ante, vol. 5, p. 95.
- (n) 1 Exch. 107; S. C. ante, vol. 5, p. 105.
 - (o) 1 Exch. 593.
- (p) Lord Denman, C. J., Patteson, J., and Wightman, J.

supposed indorser's name was written on the bill, but he had not delivered the bill to the plaintiff as intended holder to take any interest: the facts specially set out were, therefore, properly held to be an argumentative denial of the indorsement. Here, on the contrary, the plea shews that the bill was indorsed to the plaintiff as holder, conveying and intending to convey to him such interest as the drawer himself had, and no more; that is, in effect, to make the plaintiff the legal indorsee and holder of the bill, but restricting him from enforcing it against the defendant, the A plea in an action of drawer against acceptor, that the bill was accepted for the accommodation of the drawer, is manifestly a plea in excuse, and open to a replication de injurià; and this plea is in effect a similar one. The fallacy is, in supposing that the averment of indorsement contained in the declaration necessarily, and at all events, means such an indorsement as gives a right of action against the acceptor. Undoubtedly, it does so mean primâ facie; but it may be answered by a plea shewing an indorsement in fact, but accompanied with such circumstances and conditions as to preclude the indorsee from enforcing it against the acceptor,—in other words, to give the acceptor an excuse for not paying the amount to the indorsee: and the plea in question is exactly such an one.

Other cases were cited, but they are not in point. We may however observe, that the most recent of them, Washbourn v. Burçows, Bennett v. Bull, and Mortimer v. Gell all go to prove that the replication de injuriâ is not now narrowed so much as it appears to have been at first after the new rules. We may also advert to the case of Herbert v. Sayer (a), where this Court held the replication good to a plea very much involving the same point as the present case.

Judgment for the Plaintiff.

(a) 5 Q. B. 965. (See the case also reported, ante, vol. 2, p. 49.)

ROBINSON v.

1848.

CROSS, a Pauper, v. The Port of London Assurance Company.

If a plaintiff suing in forma pauperis, and residing out of the jurisdiction of the Court, makes default in not proceeding to trial, the Court will stay proceedings until the costs occasioned by such default are paid.

POWER had obtained a rule, calling upon the plaintiff to shew cause why the plaintiff should not pay to the defendants the costs of the day for not proceeding to trial, and why in the meanwhile further proceedings should not be stayed. From the affidavits it appeared that the plaintiff sued in formâ pauperis, and was residing out of the jurisdiction of the Court.

Burnie shewed cause, and contended that there was no authority for making the payment of the costs a condition precedent to further proceedings.

Power, in support of the rule. The reason why the Courts have refused to stay proceedings in an action until the payment of the costs of the day have been made, has been because there was a mode of enforcing these costs open to the defendant by attachment; per Parke, B., in Aime v. Chinnock (a). But here the plaintiff is a pauper, and resides without the jurisdiction of the Court. The defendants have no remedy, therefore, open to them to recover the amount of these costs.

PATTESON, J.—I think that these circumstances take this case out of the ordinary course.

Rule absolute.

(a) 8 Dowl. 736.

1848.

CLUTTERBUCK v. JONES and Another

J. BROWN moved, on behalf of the plaintiff, for a An order for rule to examine J. Frankis, a material witness, upon intertion of a witrogatories, under the 1 Wm. 4, c. 22, s. 4.

The affidavits in support of the application stated, that will not, in this was an action to recover the amount of an attorney's That the action was commenced on the 10th of July, 1848, and that the declaration was delivered on the 24th application of October following, and that the defendants had obtained before pleatime for pleading to the declaration, which had not yet Court refused expired. That the evidence of the witness in question to grant it, although the was "material and necessary in support of this action." witness was There was an affidavit made by a surgeon, that he knew state of health, the witness in question, that he had attended him for many probable that he might die years past as his medical attendant. That he was seventysix years of age, and "is now in a very weak state from a time. protracted illness, occasioned by a multiplicity of diseases, and particularly from a severe affection of the lungs and diseased bladder; and from the nature of the said diseases and his great age, the deponent verily believes that his life will be of very short duration; and this deponent is quite satisfied, that the said J. Frankis, if alive for the next two months, will be quite unable to travel, or to encounter the slightest possible exertion." That the venue in this cause is laid in London, and that the cause could not be tried until the sittings after Term, about the middle of December next.

J. Brown submitted, that under the circumstances of this case, a rule to examine the witness would be granted. It is true, that it is laid down in 1 Chit. Arch. Prac., 315, 8th ed., "The application should not, in general, be made until after issue joined, for until then it cannot be positively decided whether the witness be material or not; though in one

ness under interrogatories, general, be granted before sue joined; and where the in an infirm

1848.
CLUTTERBUCK
v.
JONES
and Another.

case, by consent of the parties, the Court granted the application, though it was made before issue joined, upon the party making it, undertaking not to proceed with the examination until after joinder of issue; and perhaps it might be granted before issue joined, in cases where it is quite clear what the issue must be." Here no plea has been pleaded; but it is apprehended there is no strict rule to fetter the discretion of the Court on this subject; and that where there is a probability from the illness of the witness that he may die in the meantime, the Court will grant the order.

PATTESON, J.—I do not see how I can grant such an application, or how I can know that a witness is a material and necessary witness to prove an issue which is not yet defined.

J. Brown. The Court, perhaps, will grant the order, on the undertaking of the party, as in the case of Mondell v. Steele (a), that the examination shall not be proceeded with until after joinder of issue. Some time must necessarily elapse before the rule can be made absolute.

PATTESON, J.—I must refuse the application. If I were once to break in upon the rule observed in these cases, there would be similar applications made in almost every case directly after declaration delivered.

Rule refused.

(a) 8 M. & W. 300; S. C. 9 Dowl. 812.

1848.

Doe dem. Poole v. WILLES and Others.

THIS was a rule calling on the lessor of the plaintiff to Where the shew cause why the judgment signed in the above cause and all subsequent proceedings should not be set aside.

It appeared that the above action of ejectment having been brought to recover possession of certain premises in Middlesex, an attorney was instructed to appear and defend That accordingly, the action on the part of the landlord. he entered an appearance at the Master's Office to the plaintiff was action, and on the same day delivered a plea of the general issue accompanied by a consent rule, to the attorney of the pearance as a nullity, and lessor of the plaintiff. The consent rule, however, which was so delivered, was without signature; and on the attorney of the lessor of the plaintiff going to the Master, to draw up the rule, the officer refused to draw it up. The attorney for the lessor of the plaintiff thereupon signed judgment against the casual ejector, which it was the object of the the judgment present application to set aside.

ment entered an appearance, but delivered the consent rule and plea to the plaintiff's attorney, without any signature : Held, that the entitled to treat the apsign judgment against the casual ejector. The omission, being accidental, the Court upon terms ordered to be set aside. and possession to be restored.

Lush and Prentice shewed cause. It is submitted, that the consent rule in this case being delivered without any signature was a nullity, and that the lessor of the plaintiff was entitled to sign judgment against the casual ejector. The books of practice lay it down that the defendant's attorney should sign the consent rule, leaving a space above his signature for that of the attorney of the plaintiff, and should then take it together with a common bail piece, if the proceeding be by bill, to one of the Masters, who will enter an appearance and at the same time mark the consent rule; Tidd's Pract. 1225, 6, 9th ed.; 2 Archb. According to the old practice, he was Pract. 939, 8th ed. then to take the plea and consent rule and file them at the Judge's Chambers; but now by rule of Hilary Term,

1848. Doe dem. POOLE v. Willes and Others.

1 Vict., Q. B., after reciting that "by the practice of this Court, in all actions of ejectment, it is necessary that the plea and consent rule should be filed at the Chambers of one of the Judges of the same Court; it is ordered that from and after the last day of this present Term, the said practice be discontinued, and in all such actions, the plea, with the consent rule annexed thereto, be delivered in like manner as pleas in other actions, the defendant's appearance being first entered with the proper officer, as heretofore." The appearance by the defendant, therefore, to have any effect must be accompanied by a delivery of a signed consent rule to the plaintiff's attorney. reason why this is so is evident, as otherwise the defendant might, by entering an appearance, prevent the plaintiff from having judgment against the casual ejector, and yet neglect to enter into the consent rule, by which alone, the plaintiff would be entitled to his costs. The case is analogous to that of a plea requiring counsel's signature being delivered without it, which the plaintiff may treat as no plea at all and sign judgment. In Doe d. Burnham v. Lever (a), the plaintiff had delivered a replication without the consent rule signed by him, and the Court, on the application of the defendant, set it aside with costs. In that case, Rolfe, B., says (b), "The question is, what right can a person have to reply who has not made himself a party to the suit? It is a condition precedent, therefore, to the right to reply, that he shall enter into the consent rule." In Doe d. Earl of Falmouth v. Alderson (c), the form of the consent rule was irregular, and judgment by default against the casual ejector was signed; and though the Court afterwards gave the defendant leave to amend, the right of the plaintiff to sign judgment seems not to have been contested. So in Doe d. Faithful v. Roe (d), a

⁽a) Ante, vol. 2, p. 644; S. C. 13 M. & W. 688.

⁽b) The report in 13 M. & W.

pp. 688 and 690, was referred to.

⁽c) 4 Dowl. 701; S. C. 1 M & W. 210.

⁽d) 7 Dowl. 718.

consent rule with a similar defect, was held a nullity, and judgment against the casual ejector properly signed. And in *Doe* d. *Hunchecorne* v. *Roe* (a), where the consent rule was not properly entitled, although the plea was, the Court refused to set aside the judgment signed against the casual ejector. But even should the Court be disposed, in an ordinary case, to set aside the judgment on terms; under the circumstances of the present case, they will leave the landlord to bring his action of ejectment. [They referred to 2 *Chit. Arch.* 935, 8th ed.]

Doe dem.
Poole

Willes
and Others.

Montagu Chambers and McIntyre, in support of the rule. The plaintiff had no right to sign judgment, the defendant having entered an appearance to the action. According to the practice, it appears that the defendant must take the consent rule duly signed to the Master, who thereupon enters the appearance. The Court will not presume the Master neglected his duty, and therefore it must be taken, as no doubt the fact was, that the consent rule properly signed was produced to the Master. The defendant therefore was in Court instead of the casual ejector, and judgment if at all could only be signed against him. Hil. Term, 1 Vict., Q. B., has altered the old practice. It may be that the consent rule as delivered is irregular, but then the plaintiff should have applied to the defendant to have it amended, or have come to the Court for leave to sign judgment. The case of Doe d. Burnham v. Lever has no application to the present case, except as shewing that the proper course is by application to the Court to set aside the proceeding. There is no authority that an omission, like the present, in the consent rule, renders the appearance a nullity. In the cases which have been cited of Doe d. Earl of Falmouth v. Alderson, Doe d. Faithful v. Roe, and Doe d. Hunchecorne v. Roe, the Court Doe dem.
Poole
v.
Willes
and Others.

proceeded on the ground that there was no consent rule at all in the cause. When no order has been obtained to change the attorney on the record, but a further step is taken by a new attorney, the Court have held, that it cannot be treated as a nullity; *Doe* d. *Bloomer and Others* v. *Bransom* (a). At any rate, the Court will set aside the judgment upon terms. This is an attempt to snatch a judgment for a mere accidental omission, and if the defendant's attorney had been applied to, the defect would have been remedied.

PATTESON, J.—The rule of Court says that the plea, with the consent rule annexed thereto, shall be delivered in like manner as pleas in other actions, the defendant's appearance being first entered with the proper officer as heretofore. The delivery of the consent rule is part of the appearance, and the appearance is a nullity without it is delivered. The old practice was that the consent rule and plea should be filed at the Judge's Chambers; the rule of Hil. Term, 1 Vict. Q. B., merely substitutes for that a delivery to the plaintiff's attorney, but leaves the practice in other respects unaltered. To render the appearance therefore valid, the consent rule properly signed must be delivered; and there is a good reason for this being required, for how else can it be said that one defendant is substituted in the place of the other? The object is to substitute a real defendant in the place of a fictitious one, and how can that be done, if he does not enter into the consent rule? I am, therefore, clearly of opinion, that the appearance was a mere nullity and the judgment regular. As to the consent rule properly signed being shewn to the Master on entering the appearance, no doubt that was so; but that amounts to nothing, unless delivered to the plaintiff's attorney.

As this however was without doubt an accidental omission, I think the judgment must be set aside on payment of costs, and possession restored; the defendant putting the plaintiff in the same situation for trial as he would have been in, if a valid consent rule had been delivered.

Doe dem.
Poole
v.
Willes
and Others.

Rule accordingly.

SAVERY v. LISTER.

(In the full Court.)

THIS was a rule, calling upon the plaintiff to shew cause why the judgment signed herein, and all subsequent proceedings, should not be set aside for irregularity.

It appeared that the declaration in the above cause was delivered on the 2nd of August, 1848. The defendant had eight days to plead; consequently the time for pleading expired on the 10th of August. On the 11th, the plaintiff signed judgment for want of a plea. The defendant then took out a summons before *Alderson*, B., to set aside the judgment, on the ground that under the Reg. Gen., Mich. Term, 3 Wm. 4, rule 12 (a), the time for pleading did not expire till eight days after the 24th of October. That learned Baron refused to interfere, and dismissed the summons. The present rule was then obtained; against which.

(a) Reg. Gen., Mich. Term, 3 Wm. 4, r. 12. "It is further ordered, that in case the time for pleading to any declaration, or for answering any pleadings, shall not have expired before the 10th day of August in any year, the party called upon to plead, reply, &c., shall have the same number

of days for that purpose after the 24th day of October, as if the declaration or preceding pleading had been delivered or filed on the 24th of October, but in such cases it shall not be necessary to have a second rule to plead, reply," &c.

Where the time for pleading expires on the 10th of August, the case falls within the Reg. Gen., Mich. Term, 3 Wm. 4, r. 12, and judgment for want of a plea cannot be signed till after the Vacation.

SAVERY

S.
LISTER.

Crompton shewed cause. This case is brought before the full Court, as it is desirable to have the practice established. It is true there is a decision in the Bail Court of Morris v. Hancock (a), in which Mr. Justice Patteson held, that where the time for pleading expired on the 10th of August, the plaintiff could not sign judgment till after the Vacation. But that case, being decided by a single Judge, is not considered a binding authority; and different Judges have decided the point differently at Chambers. It is submitted, that the true construction of the rule is, when the time for pleading "shall expire after the 10th of August." It could never have been the intention of the learned Judges who framed that rule, that the defendant having the full eight days for pleading before the Vacation commenced, should yet be able to delay the plaintiff during the whole Vacation.

Joyce, in support of the rule, was not called upon.

Lord DENMAN, C. J.—We think that the decision to which our Brother *Patteson* came in *Morris* v. *Hancock* is a correct one. The words of the rule are clear, and we see no reason for giving them now a different sense.

Coleridge, J., and Wightman, J., concurred.

Rule absolute.

(a) 1 Dowl. 320, N.S.

1848.

NATHAN v. STORY.

(In the full Court).

THIS was a rule calling upon the defendant to shew In this Court, cause why a rule for judgment as in case of a nonsuit, for not proceeding to trial pursuant to a peremptory under-ment as in taking, obtained on the first day of the present Term, should suit is disnot be discharged, and all subsequent proceedings set aside with costs; or why the peremptory undertaking should not be enlarged.

It appeared upon the affidavits, that a rule for judgment undertaking, as in case of a nonsuit, had been obtained in Trinity Term last, and on cause being shewn, was discharged on a peremptory undertaking, the plaintiff undertaking to go to entitle the trial at the sittings after Trinity Term. The defendant a rule absolute drew up the rule on the following day, but never served it The plaintiff not having proceeded to trial a nonsuit, on on the plaintiff. pursuant to his undertaking, the defendant on the first day not necessary that he should of the present Term obtained a rule absolute for judgment first draw up as in case of a nonsuit, which it was now sought to set aside.

Lewis shewed cause (a). The plaintiff will no doubt rely on the authority of Gingell v. Bean (b), and Knight v. Smith (c), in which cases it has been held, that the rule containing the peremptory undertaking, if not drawn up by the plaintiff, must be drawn up and served by the defendant within the time limited by the peremptory undertaking, in order to entitle the defendant to a rule for judgment as in

where a rule nisi for judgcase of a noncharged on a undertaking. the plaintiff is bound by the peremptory although he it up; and for judgment as in case of a default, it is and serve the plaintiff with the rule containing the peremptory undertaking.

⁽a) The case came on in the first instance before Patteson, J., in the Bail Court, and was by him referred to the full Court.

⁽b) 1 Scott, N. R. 153, 390;

S. C. 1 M. & G. 50, 155. (c) 7 Scott, N. R. 896; S. C. 6 M. & G. 1016; ante, vol. 1, p. 912.

1848. NATHAN STORY.

There is also a case of Sawyer v. case of a nonsuit. Thompson (a), where Alderson, B., sitting alone, decided in conformity with those cases. But these authorities at most decide the practice in the Courts of Common Pleas and Exchequer; and the practice in this Court has always been held to be different. In a late case of Landells v. Ball (b), in this Court, the cases and the practice were brought before Wightman, J.; and that learned Judge, after taking time to consider his judgment, decided to uphold the practice of this Court, which treats the plaintiff as bound by the peremptory undertaking, whether drawn up and served or not. In a note to the report of that case, a case of Collingridge v. Evans (c) is mentioned, as pending in the Court of Exchequer. No decision has yet been come to in that case, but that Court is understood to be inclined to uphold the practice of the Queen's Bench. It is submitted, that the practice of this Court is the more reasonable, which treats the peremptory undertaking as binding, although not drawn up; for if the defendant were bound to draw up the rule, it would be difficult to say at what time his liability to do so would commence, since the plaintiff would surely be entitled in the first instance to draw it up. If this were not the practice, it would always be to the plaintiff's interest not to draw it up, as in the event of the defendant's not doing so, he would thus evade the peremptory undertaking. ordinary form of the affidavit for judgment for not proceeding to trial after a peremptory undertaking, shews that service of the rule has not been considered necessary; as there is nothing said in it about service of the rule; nor in the rule itself, of its having been drawn up on an affidavit of service.

Hawkins, in support of the rule. The practice which

⁽a) 9 M. & W. 248; S. C. (b) Ante, vol. 5, p. 62. 1 Dowl. 449, N. S.

⁽c) Ante, vol. 5, p. 65, n. (b).

prevails in the Court of Common Pleas is the more reasonable and convenient. There, the general rule is adhered to, that where a party seeks to enforce a rule, he must, if the other side do not draw it up and serve it, draw it up and serve it himself, before he can treat the other side as bound by it.

NATHAN v. STORY.

Lord DENMAN, C. J.—I confess, that from the first I could not agree with the rule as laid down in those cases in the Court of Common Pleas. The practice in this Court is of long standing, and I see no reason why we should depart from it now. The judgment as in case of a nonsuit is therefore perfectly regular; but the plaintiff may have leave, under the circumstances of this case, to enlarge his peremptory undertaking upon terms.

Coleridge, J., and Erle, J., concurred.

Rule accordingly.

PEAT v. MANGNALL and Another.

THIS was a rule, calling upon the plaintiff to shew cause why the proceedings in this cause should not be stayed on payment of the amount of the verdict, with costs to be taxed by one of the Masters; and that in the mean time proceedings be stayed.

Where the plaintiff, in an action to recover unliquidated damages for proceedings be stayed.

It appeared from the affidavits, that the above action was brought to recover from the defendants unliquidated damages, for loss alleged to have been sustained by the plaintiff, by a breach of contract in not supplying paper to the plaintiff. The defendants had pleaded the general issue and two special pleas, one of which denied a request refused to

Where the plaintiff, in an action to recover unliquidated damages for breach of contract, to which the defendant had pleaded special pleas, recovered a verdict on all the issues, with damages: the Court refused to stay proceedings before

judgment signed, on payment by the defendants of the amount of damages and costs:

PEAT

MANGNALL
and Another.

to deliver. The action was tried at the last Summer Assizes at Liverpool, when a verdict was returned for the plaintiff on all the issues, damages 8l. 4s., costs 40s. On the 21st of October, the defendant took out a summons before a learned Judge at Chambers, calling upon the plaintiff to shew cause "why, upon payment of the balance of the debt for which this action is brought, together with costs to be taxed and paid on taxation, all further proceedings in this cause should not be stayed, the defendant's agent undertaking to pay the same when ascertained." The learned Judge before whom the summons came on to be heard, refused to make any order; whereupon the present rule was obtained; against which,

Atherton shewed cause. This is an unprecedented application, and without some strong authority the Court will not interpose to deprive the plaintiff of the judgment of the Court in his favour, to which he is entitled by the verdict of the jury. The only ground upon which it can be rested is, that the plaintiff is placed in the same position by the present proceeding as if he had a judgment recorded, whilst the defendant is saved from the costs attendant upon signing the judgment. Whatever might be the case in a simple action of debt or assumpsit, where the defendant only pleads the general issue; the same rule could not apply to actions where the defendant by his pleas raises other issues, which, when found in the plaintiff's favour, might be evidence for him in a cross action brought against him by the defendant. Suppose in the present instance the defendants were to bring an action against the plaintiff for not accepting the paper, alleging that they were ready and willing to deliver it; the judgment in the present action would be evidence that they were not ready and willing to deliver it. Before verdict, a defendant may offer a sum of money, and if it be refused, may then pay it into Court; and if the plaintiff takes it out, or does not recover more, he will not be entitled to costs subsequent to the offer; Fisher v. Pyne (a). But that is only on the ground that it operates as a plea of payment to the action. But a verdict once recovered, the plaintiff is entitled to judgment. A contrary rule, besides being productive of the injustice pointed out of depriving the plaintiff of the benefit of the judgment in his favour in a subsequent action, would tend to the plaintiff's prejudice by delaying him from the fruits of his verdict; as a rule like the present would always be obtained, and the plaintiff's judgment postponed till the rule could be argued. Besides the saving of costs would be but trifling, and would only be effected where the matter is disposed of by a Judge at Chambers; the costs of a rule like the present fully counterbalancing the extra costs incurred by signing the judgment.

PEAT
v.
MANGNALL
and Another.

Cowling, in support of the rule. The Judge refused to interfere at Chambers, conceiving the application to be unprecedented; but on inquiry since of the Master (b), it is ascertained that similar orders have frequently been made and acquiesced in. It seems only reasonable, that if the defendants are willing to pay the plaintiff all that he has recovered by his verdict, together with his costs, the plaintiff should not be permitted to go on and inflict upon them the useless expense of signing a judgment. [Patteson, J.-Suppose an action of trespass and a plea of right of way, and a verdict for the plaintiff with 1s. damages; would you contend that the defendant might stay the judgment on payment of the 1s. and costs? Perhaps in cases, where a right beyond the mere right to recover damages is raised on the record, the plaintiff may be entitled to have the judgment recorded; but that case does not arise here, the only real question being, what damages was the plaintiff entitled to? It is possible, as suggested, that the judgment might be evidence in the plaintiff's favour, if the defendants were afterwards to bring an action against him; but all

PEAT

MANGNALL
and Another.

that he need do in such a case would be, to take out a summons to have the judgment then regularly signed, at the defendants' expense, which a Judge would no doubt order to be done. The same argument might be used against a plea of payment into Court; Giles v. Hartis (a); and yet such a plea was early recognised in the Courts.

Cur. adv. vult.

Patteson, J.—I have not been able to find any authority in favour of this application. The practice, I am informed, has been to grant such orders, the plaintiff in many cases being willing to accept the damages and costs at once, instead of waiting till the next Term to sign his judgment; but no instance has occurred in which such an order has been made compulsory upon the plaintiff. I do not choose to introduce a new practice, and therefore think that the rule must be discharged. The application is not an unreasonable one, as the practice has been to make these orders, although not in invitum; and therefore the rule will be discharged, without costs.

Rule discharged, without costs.

(a) 1 Ld. Raym. 254.

FILBEE v. HOPKINS.

To a rule calling upon the mortgagee, why it should not be referred to the Master to ascertain what was due for principal and interest on certain mortgage deeds, bearing date respectively the 17th of November, upon payment

deeds, &c.; it is an answer that the mortgagee has delivered a notice in writing under sect. 3, that he disputes the right of the mortgager to redeem; although the delivery of such notice has been since the rule was obtained (a).

(a) See Doe d. Harrison and Another v. Louch, post, p. 270.

1847, and the 26th of January, 1848, in the affidavit of Lawrence mentioned, and also to tax the plaintiff's costs in the above action, and of the lessor of the plaintiff in the action of ejectment; and why the plaintiff should not accept the amount of such principal, interest, and costs so ascertained to be due, and execute an assignment or reconveyance to the defendant, or as the Master should direct; and why the plaintiff should not deliver up all deeds, &c. relating to the lands comprised in such mortgages: or why, in case of his refusal so to do, the said principal, interest, and costs should not be paid into this Court, and be deemed and taken to be in full satisfaction of the said mortgages; and why all proceedings in the meantime should not be stayed.

The rule was obtained upon an affidavit made by one Lawrence, the agent of the attorneys of the defendant, which stated that the above action was brought to recover 550L, due on a mortgage dated the 17th of November, 1847, together with interest, and another sum of 600L, secured by another mortgage dated the 26th of January, 1848, with interest, and another sum of 500L; and that the plaintiff had also commenced an action of ejectment to recover possession of certain premises, being part of the premises mentioned in the above indentures of mortgage. That the defendant had appeared to the first mentioned action, and was ready and willing to pay unto the said plaintiff all the principal monies and interest due on the said indentures of mortgage, and all the costs which had been expended by the said plaintiff in any suit or suits at law or in equity upon the same.

The affidavit in answer to the rule was of some length, and went fully into the whole transactions concerning the mortgages and the proceedings to foreclose the same, and shewed that the mortgagee had entered into contracts with purchasers with the knowledge of the defendant. It stated that the mortgagee had incurred costs over and above the costs of the action and of the ejectment, and that this

FILBER v.
HOPKINS.

FILBEE
v.
HOPKINS.

action was brought to recover the sum of 500L beyond the two several sums secured by the two indentures of the 17th of November, 1847, and the 26th of January, 1848. That a notice in the following form was served on the defendant's attorneys on the 18th of November, 1848, after the present rule was obtained: "I do hereby, as attorney for the said plaintiff duly authorized in this behalf, and in pursuance of the statute in that case made and provided, insist that the said defendant has no right to redeem the mortgaged premises mentioned in the affidavit of Lawrence. Dated, 18th of November, 1845. Your's H. B. Mason, plaintiff's attorney. To Messrs. Allpress and Lawrence, defendant's attorneys, and to Mr. Lawrence, their agent."

Sir F. Thesiger and Lush shewed cause. They took objections; First, that, upon the affidavits in answer, it appeared, that the defendant had no right to redeem the mortgaged lands, as under the circumstances therein detailed, there was no equity of redemption; and, therefore, that the case did not come within the act of Parliament 7 Geo. 2, c. 20, s. 1 (a), which only applies to persons

(a) 7 Geo. 2, c. 20, s. 1. "Whereas mortgagees frequently bring actions of ejectment for the recovery of lands and estates to them mortgaged, and bring actions on bonds given by mortgagors to pay the money secured by such mortgagees, and for performing the covenants therein contained, and likewise commence suits in his Majesty's Courts of equity to foreclose their mortgagors from redeeming their estates; and the Courts of law, where such ejectments are brought, have not power to compel such mortgagees to accept the principal monies and interests

due on such mortgages, and costs. or to stay such mortgagees from proceeding to judgment and execution in such actions; but such mortgagors must have recourse to a Court of equity for that purpose: in which case likewise the Courts of equity do not give relief until the hearing of the cause:" " for remedy thereof, and to obviate all objections relating to the same; be it enacted, that where any action shall be brought on any bond for payment of the money secured by such mortgage, or performance of the covenants therein contained, or where any action of ejectment shall be

"having right to redeem such mortgaged lands;" and upon this point they referred to Goodtitle d. Taysum v. Pope (a). Secondly, to the form of the rule; that it did not bind the defendant to pay the money which should be found due. Thirdly, to the materials on which it was obtained; that it was not shewn that the defendant had offered to pay, or that the plaintiff had refused to receive the amount due;

FILBEE v.
HOPKINS.

brought in any of his Majesty's Courts of record at Westminster. or in the Court of great sessions in Wales, or in any of the superior Courts in the counties palatine of Chester, Lancaster, or Durham, by any mortgagee or mortgagees, his, her, or their heirs, executors, administrators or assigns, for the recovery of the possession of any mortgaged lands, tenements, or hereditaments, and no suit shall be then depending in any of his Majesty's Courts of equity in that part of Great Britain called England, for or touching the foreclosing or redeeming of such mortgaged lands, tenements or hereditaments; if the person or persons having right to redeem such mortgaged lands, tenements or hereditaments, and who shall appear and become defendant or defendants in such action, shall at any time pending such action, pay unto such mortgagee or mortgagees, or in case of his, her, or their refusal, shall bring into Court, where such action shall be depending, all the principal monies and interest due on such mortgage, and also all such costs as have been expended in any suit or suits at law or in equity upon such mortgage (such money for principal, interest, and costs to be ascertained and computed by the Court where such action is or shall be depending, or by the proper officer by such Court to be appointed for that purpose), the monies so paid to such mortgagee or mortgagees, or brought into such Court, shall be deemed and taken to be in full satisfaction and discharge of such mortgage, and the Court shall and may discharge every such mortgagor, or defendant, of and from the same accordingly; and shall and may, by rule or rules of the same Court, compel such mortgagee or mortgagees, at the costs and charges of such mortgagor or mortgagors, to assign, surrender, or re-convey such mortgaged lands, tenements, and hereditaments, and such estate and interest, as such mortgagee or mortgagees have or hath therein, and deliver up all deeds, evidences, and writings, in his, her, or their custody, relating to the title of such mortgaged lands, tenements, and hereditaments, unto such mortgagor or mortgagors, who shall have paid or brought such monies into Court, his, her, or their heirs, executors, or administrators, or to such other person or persons, as he, she, or they, shall for that purpose nominate or appoint."

(a) 7 T. R. 185.

FILBER

T.

HOPKINS.

whereas the statute 7 Geo. 2, c. 20, s. 1, only authorizes the application to the Court, in case of "the refusal" of the mortgagee to receive the sum due. [Patteson, J.—If you construe the statute strictly, it certainly seems to contemplate that the defendant should first tender the sum to the plaintiff, and only "in case of his refusal" come to the Court. I am not aware if it is usual to have an affidavit that the money has been tendered]. In equity, when a bill is filed to redeem, the party filing it must pay the money at once into Court. And fourthly, that the application was answered by the plaintiff's affidavit, which shewed that a notice had been given under the 3rd section of the act (a), that the plaintiff disputed the defendant's right to redeem the mortgaged premises, which took the case out of the provisions of the statute.

W. H. Watson and Crouch, in support of the rule. The materials on which the rule was obtained, are sufficient. The defendant cannot tender the amount due, until it has been ascertained by the Master.

PATTESON, J.—How do you answer the fourth objection, that here a notice has been given under the 3rd section that the plaintiff insists that the defendant has no right to

(a) Sect. 3. "Provided always, that this act, or any thing herein contained, shall not extend to any case where the person or persons, against whom the redemption is or shall be prayed, shall (by writing under his, her, or their hands, or the hand of his, her, or their attorney, agent or solicitor, to be delivered, before the money shall be brought into such Court at law, to the attorney or solicitor for the other side) insist, either that the party praying a redemption has not a right to redeem, or that the premises are chargeable with other or dif-

ferent principal sums, than what appear on the face of the mortgage, or shall be admitted on the other side; nor to any case where the right of redemption to the mortgaged lands and premises in question in any cause or suit shall be controverted or questioned by or between different defendants in the same cause or suit; nor shall be any prejudice to any subsequent mortgagee or mortgagees, or subsequent incumbrancer; any thing in this act contained to the contrary thereof in any wise notwithstanding."

redeem? The 3rd section provides, "that this act" "shall not extend to any case where the person" "against whom the redemption is or shall be prayed, shall (by writing under his hand or the hand of his attorney," &c. "to be delivered, before the money shall be brought into such Court at law, to the attorney or solicitor on the other side) insist either that the party praying a redemption has not a right to redeem," &c.

FILBER v. Hopkins.

W. H. Watson and Crouch. It could scarcely be the intention of the Legislature that the mere statement in writing that the party intends to dispute the right of the mortgagee to redeem should be sufficient to take the case out of the statute.

PATTESON, J.—The language of the act is very clear upon this point.

W. H. Watson and Crouch. The notice is given after the present rule was obtained.

PATTESON, J.—The 3rd section only requires it to be given "before the money shall be brought into Court." I do not see how you can get over the express words of the statute.

Rule discharged (a).

- Sir F. Thesiger asked that it might be discharged with costs.
- W. H. Watson. It is discharged on matter arising since the rule was obtained.

PER CURIAM.—Let the question of costs be referred to the Master.

Rule accordingly.

(a) See the following case.

[1849.]

Doe dem. Harrison and Another v. Louch (a).

On an application by a mortgagor under the 7 Geo. 2, c. 20, s. 1, a notice under the 3rd section. merely stating that the mortgagee insists that the mortgagor has no right to rethe premises are charged with other sums than those appearing on the face of the mortgage, (without shewing on the face of it, or in the affidavit accompanying it, some reason why the mortgagor has no right to redeem, or what the other sums chargeable on the premises are), is insufficient.

A RULE had been obtained in Hilary Term, 1849, calling upon the lessors of the plaintiff to shew cause why it should not be referred to one of the Masters to ascertain what was due for principal and interest on the mortgage made to Richard Harrison in the affidavit mentioned, and to tax the lessors of the plaintiff their costs; and why they should not accept the amount of such principal, interest, and costs so ascertained to be due, in discharge of such mortgage, and deem, and that execute an assignment or re-conveyance to the said William Louch, or as the Master should direct; and why they should not deliver up all deeds, evidences, and writings in their or either of their possession relating to the premises comprised in such mortgage; or why, in case of their or either of their refusal so to do, the said principal, interest, and costs should not be paid into Court to abide the further order of this Court, and be deemed and taken to be in full satisfaction of the said mortgage respectively; and why all further proceedings in this cause should not be stayed; and that in the meantime proceedings be stayed.

> It appeared upon the affidavits in support of the rule, that an action of ejectment having been brought by the lessors of the plaintiff as executors of the mortgagee of certain premises, under a mortgage deed dated 23rd of February, 1843, for securing a sum of 60L, with interest, the present rule, under the 7 Geo. 2, c. 20, was obtained, on affidavits stating these facts, and that a sum of 1091. 15s., with the costs of the ejectment, had been tendered and refused; that no suit was pending for foreclosing or redeeming the mortgaged premises; and that the defendant was the party entitled to redeem them.

The affidavits in answer shewed, that since the above

⁽a) This case was decided in Trinity Term, 1849, but may be here conveniently inserted.

rule was obtained, the following notice had been served on the defendant, on behalf of the lessors of the plaintiff:— Doe dem. HARRISON and Another

LOUCH.

In the Queen's Bench.

Between John Doe on the Demise of Joseph Harrison and Edward Harrison, Plaintiff, and

WILLIAM LOUCH - Defendant.

We, the undersigned Joseph Harrison and Edward Harrison, of Newbury, in the county of Berks, carpenters, the lessors of the plaintiff in this cause, as executors of Richard Harrison, late of Newbury aforesaid, deceased, do hereby give you notice, that we shall insist, and do by this writing under our respective hands hereby insist, that you have not a right to redeem all that cottage or tenement situate, standing, and being at Chieveley aforesaid, &c., together with, &c., expressed to be granted, bargained, sold, and demised for the term of one thousand years, by a certain indenture, bearing date the 23rd day of February, 1843, and made between the said defendant William Louch, of the one part, and the said Richard Harrison, deceased, of the other part, which are the same premises sought to be recovered in this action of ejectment. And we do hereby further give you notice, that we shall insist, and do hereby insist, that the said premises are charged with other and different principal sums than that appearing on the face of the said mortgage.

Dated this 4th day of April, 1849.

To Mr. William Louch, the above named defendant, and to Messrs. Jerè Bunny and Henry Bunny, his attornies, and to Mr. Rich. Hunter, defendant's attornies' agent.

Joseph Harrison. Edward Harrison.

The affidavits stated other facts not material to the point decided by the judgment, but did not shew what the other and different sums alleged to be chargeable on the premises were.

Doe dem.
HABBISON
and Another
b.
LOUCH.

W. H. Watson and Selfe shewed cause (a). This is an application under the stat. 7 Geo. 2, c. 20, s. 1 (b), which enacts, that "where any action of ejectment shall be brought" "by any mortgagee," &c., "for the recovery of the possession of any mortgaged lands," &c., "and no suit shall be then depending in any of his Majesty's Courts of equity," &c., "for or touching the foreclosing or redeeming of such mortgaged lands," &c.; "if the person" "having right to redeem" "shall at any time pending such action pay unto such mortgagee," &c., "or, in case of his" "refusal, shall bring into Court, where such action shall be depending, all the principal monies and interest due on such mortgage, and also all such costs as have been expended in any suit or suits at law or in equity upon such mortgage," "the monies so paid" "shall be taken to be in full satisfaction and discharge of such mortgage, and the Court shall and may discharge every such mortgagor" "of and from the same accordingly," "and may by rule or rules of the same Court compel such mortgagee," "at the cost" "of such mortgagor," "to assign, surrender, or re-convey such mortgaged lands," &c., "and deliver up all deeds," &c. By the third section (a), however, it is provided, "that this act, or anything herein contained, shall not extend to any case where the person" "against whom the redemption is" "prayed, shall (by writing under his" "hand," "or the hand of his" "attorney," &c., "to be delivered, before the money shall be brought into such Court at law, to the attorney," &c., "for the other side), insist, either that the party praying a redemption has not a right to redeem, or that the premises are chargeable with other or different principal sums, than what appear on the face of the mortgage, or shall be admitted on the other side," &c. And the present case is brought within that proviso, for here a notice in writing has been duly delivered, that the lessors of the plaintiff "insist" that the defendant "has not a right to redeem"

⁽a) In Easter Term, 1849. (c) See this section, ante, (b) See this section, ante, p. 266, p. 268, n. (a).
n. (a).

the mortgaged premises; and also that they "insist that the premises are charged with other and different principal sums than that appearing on the face of the said mortgage." The case of Filbee v. Hopkins (a) is an express authority that such a notice is a complete answer to the application, and that it is no objection that it has been given since the rule nisi was obtained, if given before the money is paid or brought into Court. The defendant will possibly rely on the case of Goodtitle dem. Leon v. Lonsdown (b), where an objection that the notice ought to state what other sums are chargeable on the mortgaged premises, was sustained by the Court of Exchequer; but that case is not applicable, as here the notice is not only that other sums are chargeable, but also that the lessors of the plaintiff insist that the defendant "has not a right to redeem;" and the statute makes either alternative an answer to the application. They then proceeded to argue the case upon the merits; and referred to Goodtitle dem. Taysum v. Pope (c), and Sutton v. Rawlings (d).]

Doe dem. HARRISON V. LOUCH.

Huddleston, in support of the rule. The intention of the statute would be defeated, if the construction now sought to be put upon it, were maintained. In no case would it be possible, were the mortgagee unwilling, to obtain the proposed relief, for he might always serve a notice in the above form. The principle of the decision in Goodtitle dem. Leon v. Lonsdown is strictly applicable to the present case. There Macdonald, C. B., says, "It is necessary that the nature of the ulterior demand, and its amount, should be stated; for if the sum claimed is admitted, it is no longer an objection to the order being made, and the defendant must know the claim, otherwise he cannot admit it. Besides we are to see that a real demand is set up, of

⁽a) Since reported, ante, p. 264. (d) Exch. Hil. Term, 1849.

⁽b) 3 Anstr. 937.

Not yet reported.

⁽c) 7 T. R. 185.

Doe dem. HARRISON v. LOUCH. a nature which cannot be determined in this summary method, for if the mere insisting on further charges were sufficient, the intention of the act would be wholly defeated." The same reasoning applies where the party relies on the objection that the defendant has no right to redeem. This case was not brought under the notice of the learned Judge who decided the case of Filbee v. Hopkins (a). Shinner v. Stacy (b), and Bingham v. Gregg (c), shew that the Court inquires into the nature of the further charges set up, before allowing them as cause against applications like the present; and in Goodtitle v. Bishop (d), the Court inquired into the nature of the defendant's right to redeem. [He cited also Rex v. Milnrow (e); Rex v. Wrottesley (f); Reg. v. Dodson (g); and Lilley v. Harvey (h): and proceeded to argue the case on the merits.]

Cur. adv. vult.

Afterwards, [in Trinity Term, 1849,] the following judgment was delivered by

Colerage, J.—This was an application under the 7 Geo. 2, c. 20, by a mortgagor; in answer to which it was objected, that under the proviso in the 3rd section of the act, the lessor of the plaintiff had delivered a notice in writing, insisting that the defendant had no right to redeem, and that the premises were chargeable with other principal sums than appeared on the face of the mortgage, or were admitted by the defendant. On the part of the defendant it was argued, that the notice was insufficient, because it did not specify on what grounds the right to redeem was denied; nor with what sums, not appearing on the face of the mortgage, nor admitted by the defendant,

- (a) Since reported, ante, p. 264.
- (b) 1 Wils. 80.
- (c) Barnes, 182.
- (d) 1 Y. & J. 347, n.
- (e) 5 M. & S. 248.
- (f) 1 B. & Ad. 648.
- (g) 9 A. & E. 704.
- (h) Ante, vol. 5, p. 648.

the premises were chargeable. In support of this objection Goodtitle dem. Leon v. Lonsdown (a), was cited, in which a notice was relied on, that the plaintiff "insisted that other principal sums were chargeable upon the premises, besides the mortgage;" and the Court of Exchequer held the notice insufficient, saying, that "it was necessary that the notice of the ulterior demand, and its amount should be stated," adding, that "if the mere insisting on further charges were sufficient, the intention of the act would be wholly defeated." On the other hand, a judgment of my Brother Patteson, in Filbee v. Hopkins, argued in this Court in Michaelmas Term last, was relied on, with a note of which Mr. Loundes has been good enough to supply me. There the notice was merely, "I insist that the defendant has no right to redeem the mortgaged premises;" and was held by him to The former case was not cited in the be sufficient. latter, but the reasoning on which the judgment in it rests, was strongly urged in argument; the learned Judge, however, thought the words of the statute too clear; they do not take the case out of the 1st section, merely where the party praying redemption has no right to redeem, or where other unadmitted sums than those appearing on the face of the mortgage are charged on the premises; but where by the writing delivered to the defendant's attorney, the plaintiff insists, either that the defendant has no right to redeem, or that the premises are chargeable with those other sums. And there is a material change in the language of this clause, as it advances, to specify another case to which the statute shall not extend, where instead of speaking of notices and their interests, it speaks of the right of redemption being controverted between different Here it is not enough to insist by notice in defendants. writing, but the fact of the dispute must be made out in order to get rid of the defendant's application.

Doe dem. HARRISON v. LOUCH.

(a) 3 Anstr. 937.

Doe dem. HABRISON v. LOUCH.

I think, with my Brother Patteson, that the language on which he relied, was too clear to make it necessary for the lessor of the plaintiff to shew by proof that the party claiming the redemption has no right to redeem, or that there are other unadmitted sums charged on the premises, which do not appear on the face of the mortgage; and I think that to require this would not only be to extend the operation of the statute beyond the fair meaning of the words, but beyond convenience, and the policy on which it was framed. It seems to me to have been intended to break in on the jurisdiction of the Court of Chancery only, to the limited extent of perfectly plain cases on admitted facts, or facts capable of ascertainment by the way ordinarily pursued on motion in the common law Courts. For this purpose it enlarges our powers, and enables us to direct a re-conveyance; but only where no suit in equity has been commenced. If this intention be kept in view, the statute is highly beneficial; but if it be extended in its operation to the decision of questions more fitted for more equitable modes of discovery, trial, and decision, it may be very mischievous.

Still I continue to think, that enough must be stated by the mortgagee to enable the Court of law to determine what the question is between the parties; if he be bound to state what the unadmitted sums are, which he says are charged on the premises, the mortgagor may forthwith admit them; the claim may be clear when expanded on the face of the affidavit, or the amount so small, that he may not think it worth while to dispute it; so if he be bound to say that there is no right to redeem, because this or that has happened; the very statement may shew beyond question, that the supposed cause is really but colourable; at all events, the Court of common law is enabled to judge whether a case for its jurisdiction properly arises or not. And it is to be remembered, that the mortgagee in the hands of a litigious adviser has the temptation to dispose of

the application by any summary answer which may serve the turn for the time, because he has only to commence a suit in equity before a second application made, and he prevents the recourse to this cheap mode of settling the question for ever; and it is almost impossible to convict a party of perjury on an affidavit so general, as would have sustained the decision in *Filbee* v. *Hopkins* (a). Doe dem. HARRISON v. LOUCH.

Nor do I think that the decision in Goodtitle dem. Leon v. Lonsdown (b) breaks in on the language of the statute; "to insist that a mortgagee has not a right to redeem," may well mean more than merely saying or writing those words, when used in reference to an answer given in a Court of justice to a claim for a re-conveyance; which Court is bound to collect, at least from the statement, that the insisting is bonâ fide, and on its face something real and arguable. The same remark applies to the other branch of the sentence.

For these reasons and to this extent, being obliged to make my election between the two cases, I think that I ought to adhere to the earlier decision.

The rule, therefore, will be absolute; but it was arranged between the parties in the course of the argument, that it was to be on the terms of the lessor of the plaintiff being indemnified as to costs incurred with his own attorney, to such extent as the Master may think reasonable.

Rule absolute.

(a) Since reported, ante, p. 264.

(b) 3 Anstr. 937.

1848.

CLARKE and Others v. The East India Company.

A Judge at Chambers has no power to grant a writ in the nature of a mandamus or commission to examine witnesses in India or the colonies, under the 13 Geo. 3, c. 63, s. 44, and the 1 Wm. 4, c. 22.

4, c. 22.
The application for such a writ should be made to the Court.

THIS was a rule, calling upon the plaintiffs to shew cause why an order made by a learned Judge at Chambers for a writ in the nature of a mandamus, to issue to examine certain witnesses in the Island of Mauritius, should not be rescinded, and a new writ be granted for the same purpose by this Court.

It appeared that certain witnesses, whose evidence was necessary in the above cause, were living at the Mauritius; and a Judge's order had been obtained by the defendants for a writ in the nature of a mandamus or commission to examine them. A doubt had since arisen whether a Judge at Chambers had power to grant such a writ; the statute 13 Geo. 3, c. 63, s. 44, which authorized the issuing such a writ, providing that where any action, the cause of which shall have arisen in India, is brought "in any of his Majesty's Courts at Westminster," "it shall and may be lawful for such Court respectively, upon motion there to be made," to award a writ in the nature of a mandamus or commission for the examination of such witnesses accordingly. A dictum of Parke, B., in Smeeton v. Collier (a),

(a) 1 Exch. 457; S. C. ante, vol. 5, p. 184. The passage referred to was as follows:—" The next question is, whether a Judge at Chambers has, under this statute, a power to make the order in question. In the construction of the act, we must hold that the Courts may exercise the power given to them by it in the common and ordinary way, unless it contain something to the contrary. When, therefore, a Judge exercises the duties which belong to the Court, it is to be taken that

he is to exercise them in the same manner as the Court itself, unless there is something in the context of the act which leads to a different conclusion. As, for example, in the 43 Geo. 3, c. 46, where the enactment is that the motion is to be made in open Court, it is clear that the Judge is not to have any power in the matter. Again, in 48 Geo. 3, c. 123, it is enacted, that the application must be made in Term time to one of the superior Courts, which shews that the

was referred to on moving for the present rule, as shewing that the power thus given could not be exercised by a Judge at Chambers. The statute 1 Wm. 4, c. 22, was also alluded to as merely extending the provisions of the former act to the colonies, &c., without altering in any way the mode of proceeding. A letter had been written to the plaintiffs' attorney, to know if they would consent to take no objection to the validity of the writ; but no answer having been returned, the present rule was obtained.

CLARKE and Others

B.

EAST INDIA
COMPANY.

Manisty shewed cause. It has been the constant practice at Chambers to grant these writs. The case of Smeaton v. Collier, on which this rule was moved, was decided on a different statute, and the decision was, that a Judge had the power; although the words in the act did not refer to a Judge, but simply said, "the Court shall and may," &c. [Patteson, J.—Yes, but the Court there intimate a different construction, if there was anything in the act itself which imported that the power was conferred with a special limitation. It is singular, that in the 40th section, which applies to indictments, the words are, "upon motion to be made;" whereas in the 44th section, which applies to actions, &c., they are, "upon motion there to be made." Whether that makes any difference between the two sections I do not know; but I think it is clear that the application for such a writ as the present ought to be made to the Court, and not to a Judge at Chambers]. The defendants, at any rate, have no right now to come to the Court, and create a delay by this application.

Legislature intended that the power should be exercised by the Court, and not by the Judge. So, in the Interpleader Act, the first section states that it shall be lawful for 'the Court, or any Judge thereof,' to make rules or orders; but the sixth section

enacts, that 'the Court' shall have power to call the parties before them 'by rule of Court.' This shews that the Legislature contemplated a distinction between the powers to be exercised by the Court and the Judge." 1 Exch. 463, 4.

1848. CLARKE and Others EAST INDIA COMPANY.

Forsyth, in support of the rule, contended that the application was made bonâ fide, in consequence of the doubt that had arisen, and not for the purposes of delay.

PER CURIAM.

Rule absolute.

WILKINSON v. WILLATS.

Where, on an application to enlarge a peremptory un-dertaking, after default of a material witness, (which was also the ground on which the rule for judgment as in case of a nonsuit, had been discharged;) it is not necessary that the name of the witness should be stated.

THIS was a rule, calling upon the defendant to shew cause why the plaintiff should not be at liberty to enlarge his peremptory undertaking.

It appeared that a rule for judgment as in case of a ground alleged nonsuit, had been discharged on the 1st of May, in Easter is the absence Term, 1848, on an affidavit of the absence of a material witness, the plaintiff giving a peremptory undertaking to try at the Berkshire Summer Assizes, 1848. The plaintiff did not go to trial, but obtained the present rule on the first day of the present Term, on an affidavit, "that immediately after the 1st day of May last, the date of the rule made in this cause, he" (the plaintiff) "followed up the information which he was in possession of, regarding the residence of the material witness, on account of whose absence he could not proceed to trial at the time when the said rule was made, and that he was unable to obtain the address of such witness, or discover where he was to be found, although he used exertion to do so, until after the time when it was too late to give notice of trial in this cause, for the commission day for Abingdon, where the said assizes were appointed to be held."

> H. J. Hodgson shewed cause. This is a second default. and the name of the witness should have been given. Montfort v. Bond (a), which was a rule to enlarge a per-

> > (a) 2 Dowl. 403.

emptory undertaking, Mr. Justice Littledale says, "It is not necessary that the witness should be named in the case of the first default, but in that of the second it may be different." In that case, it does not appear what the excuse was, on which the rule, discharging the rule for judgment as in case of a nonsuit upon a peremptory undertaking, had been made; and it is to be assumed from the language of the Court, that it was, for the first time, on the motion to enlarge the peremptory undertaking. that the absence of a material witness was set up as an excuse. Here, it has already been admitted as an excuse for a first default, and is now sought to be set up in the same general terms for a second. The defendant should have the means afforded him of ascertaining whether the excuse is true. The application is entirely to the discretion of the Court.

WILKINSON

V.

WILLATS.

Charnock, in support of the rule. The case cited is an authority against the objection. Considerable inconvenience would be experienced by a plaintiff if he were bound to disclose the names of his witnesses. The plaintiff is too late to bring a fresh action; the Statute of Limitations has intervened. [He was then stopped by the Court].

PATTESON, J.—I do not very well see why the name of the witness should be specified more on the second occasion than on the first; particularly where, as in the present case, the same person is referred to on both occasions. I think, that in the absence of any express decision, that, on a second default, the name of the witness is required to be stated; I should be pressing too hard upon the plaintiff, if I were to prevent him from trying this cause; particularly as he is too late to bring a fresh action.

Rule absolute.

1848.

CONNOP and Another v. LEVY.

Where there was an issue in fact and an issue in law to be tried, and the plaintiffs gave notice of trial of the issue in fact, with assessment of contingent damages, &c., and pending the decision of the issue in law, counter-manded their notice of trial. the Court discharged a rule for judgment as in case of a nonsuit, upon a peremptory undertaking being given.

PEACOCK had obtained a rule for judgment as in case of a nonsuit, on an affidavit stating that the defendant had pleaded non assumpsit and two special pleas. That the plaintiffs joined issue on the first plea, and demurred to the two others. That on the 10th of June, 1847, the plaintiffs gave notice of trial and assessment of contingent damages for the adjournment day after Trinity Term for London. That the demurrers were argued in Michaelmas Term, 1847, and judgment given for the defendant on the 26th of February, 1848. That the plaintiffs did not proceed to trial, but countermanded the notice of trial on the 3rd of December, 1847.

Aspland shewed cause. The contents of the defendant's affidavit shew a sufficient excuse for not proceeding to trial. The judgment of the Court on the demurrers was impending when the notice was countermanded, and it was reasonable that the plaintiffs should wait to see what that judgment would be. There was, therefore, no default.

Peacock offered to withdraw the general issue, the plaintiffs undertaking to bring no writ of error on the judgment on the demurrers.

Aspland. The plaintiffs cannot accept the offer, they wish not to be precluded from a writ of error, and that cannot be brought until the issue in fact is disposed of, and damages assessed.

Peacock. As the plaintiffs are not yielding to the opinion of the Court expressed in the judgment, they are shut out from setting up the delay as an excuse for not proceeding. There has, therefore, been a default, and in the absence of an affidavit from the plaintiffs, the defendant is entitled to judgment as in case of nonsuit.

PATTESON, J.—I think it was reasonable that the plaintiffs should wait, even though they desire, on finding the judgment against them, to carry it to a Court of error. The rule must be discharged on a peremptory undertaking.

CONNOP and Another v.

Rule discharged accordingly.

In re a Plaint or Action in the County Court of STAFFORDSHIRE.

[1849.]

Between

WALTER YATES, Plaintiff.

SARAH PALMER, Defendant (a).

A RULE had been obtained in Easter Term last, calling upon the Judge of the County Court of Staffordshire, and the plaintiff in the above action, to shew cause why a writ of prohibition should not issue to prohibit the said Court, the Judge of the said Court, the bailiffs and other officers of the said Court, from further proceeding in the plaint or action in that Court between the above named parties; and why the sum of 51.5s., the damages, and 91.9s.8d., costs, paid by the defendant as the damages and costs under protest, should not be returned to the said defendant.

The plaintiff, it appeared, had brought the above action, as if it had jurisdiction, which was in replevin in the County Court of Staffordshire; and the ground upon which the present rule was obtained, damages and costs; it is too late to apply distress was made, came into question on the trial. Upon the affidavits, it appeared, that the defendant as well as the plaintiff knew or ought to have known, that the title would

(a) This case was decided in Trinity Term, 1849.

Where an action is brought in an inferior Court, and the defendant appears at the trial, and makes no objection to the urisdiction of the Court whilst the case is proceeding, but suffers the Court to act without protest or objection, jurisdiction, payment of damages and late to apply for a prohibition, even though the party had no opportunity of applying earlier to the superior Court; unless

the want of jurisdiction appears upon the face of the proceedings. Semble, that the action of replevin in the County Court is regulated by the 121st section of the 9 & 10 Vict. c. 95, and not by the 58th; and that, therefore, the mere fact of title being in question at the trial, does not take away the jurisdiction of the County Court, if neither party take any steps to remove the action under the 121st section.

YATES

PALMER.

be brought into question; yet neither party had taken any step under the 121st section of the 9 & 10 Vict. c. 95, to remove the cause from the County Court, into this or some other superior Court, having cognizance of matters of title. The cause came on for trial on the 20th of February, 1849, when both parties attended, and the title did come in question. A verdict was returned in favour of the plaintiff. No objection was made at the trial to the jurisdiction of the Court. At a subsequent sitting of the Court on the 27th of March, the defendant moved for a new trial, but without success; and on that occasion also, no objection was raised to the jurisdiction of the Court. The plaintiff then proceeded to tax his costs; and the defendant paid the amount of damages and costs under protest, to save execution; the defendant proposing to make some further application to the County Court at its next sitting. All these proceedings had taken place previous to Easter Term, 1849; and no objection appeared at any time to have been made to the jurisdiction of the County Court, until the present rule was obtained.

Pigott shewed cause (a). First, the defendant comes too late; there is nothing now to prohibit. Secondly, it may be admitted that the title to the premises in respect of which the distress was taken, came into question at the trial; and that, therefore, before the recent act, 9 & 10 Vict. c. 95, the County Court had no jurisdiction in such a case (b). The question, however, now turns upon the construction of the 58th and 121st sections of that act. The 58th section defines the jurisdiction of the new County Courts, and enacts, "that all pleas of personal actions, where the debt or damage claimed is not more than 20L, whether on balance of account or otherwise, may be holden in the County Court, without writ;" &c., "provided always, that the Court shall not have cognizance of any action of ejectment, or in which the

⁽a) In Trinity Term.

⁽b) See Tinniswood v. Pattison, 3 C. B. 243.

TRINITY TERM, 12 VICT.]

title to any corporeal or incorporeal hereditaments," &c., "shall be in question." It is submitted, that the action of replevin does not come within that section, but is regulated by the 119th, 120th, and 121st sections. The 119th section provides, that "actions of replevin," "which shall be brought in the County Court, shall be brought without writ in a Court held under this act." The 120th section provides, "that in every such action of replevin the plaint shall be entered in the Court, holden under this act, for the district wherein the distress was taken." And the 121st section regulates the manner in which actions of replevin may be removed from the County Court, where it appears that the title comes in question. It enacts, "that in case either party to any such action of replevin shall declare to the Court in which such action shall be brought, that the title to any corporeal or incorporeal hereditament," &c., "is in question," "and shall become bound, with two sufficient sureties," &c., "in such sums as to the Judge shall seem reasonable," &c., "to prosecute the suit with effect and without delay, and to prove before the Court by which such suit shall be tried, that such title as aforesaid is in dispute between the parties, or that there was ground for believing that the said rent or damage was more than 20L; then, and not otherwise, the action may be removed before any Court competent to try the same in such manner as hath been accustomed." It is submitted, that the County Court now has jurisdiction over actions of replevin in all cases, except where the proper steps under the 121st section are taken to remove the action into a superior Court. If, therefore, the defendant wished to object to the jurisdiction of the County Court, on the ground that the title came in question, he was bound to do so in the manner pointed out by that section. The defendant would read the proviso in the 58th section, as if it were a separate and independent enactment. [Wightman, J.—As at present advised, I agree with you; for the words are strong, "then, and not otherwise."]

YATES
PALMER.

YATES

V.

PALMER.

The Court then called on

Ball, to support the rule. As to the first objection, Roberts v. Humby (a) is an authority that where the defendant could not come earlier, he is not too late even after sentence and execution. As to the second objection. the words of the 58th section are clear and distinct, "that the Court shall not have cognizance of any action," " in which the title to any corporeal or incorporeal hereditaments" "shall be in question." The 121st section is meant to apply to cases where the removal takes place before trial; and the object of it is to save incurring useless expenses in the County Court in actions over which it has no jurisdiction. [Wightman, J.-What is to hinder that section from applying, when the cause comes to trial? I cannot see why this section should not apply to a case like the present. The Either party may remove the repleving suit at any time before trial, in the manner pointed out by the 121st section; but if neither party do so, then the cause comes on for trial, and if it appears that title is involved, the 58th section applies, and the Judge of the County Court has no longer jurisdiction to try it.

Pigott. The defendant, by attending and taking the chance of a verdict in his favour, has waived any objection arising from the title being in question.

Ball. Want of jurisdiction cannot be waived.

Cur. adv. vult.

The following judgment was afterwards (b) delivered by Patteson, J., for

WIGHTMAN, J.—In this case, a rule to shew cause had been obtained by the defendant, for a prohibition to the County Court of Staffordshire, in a replevin suit there, on

⁽a) 3 M. & W. 120; S. C. 6 Dowl. 82.

⁽b) In the sittings in Banco in Trinity Vacation, 1849.

the ground, that upon the trial, the title to the premises, in respect of which such distress was made, had come in question.

YATES

PALMER.

It appears from the affidavits, that the defendant as well as the plaintiff, knew or ought to have known, that the title would be brought into question; but that neither party took any step under the 121st section of the 9 & 10 Vict. c. 95, to remove the cause from the County Court to some superior Court, having cognizance of matters of title.

The cause was tried in February last, when the title did come in question, and a verdict was given for the plaintiff. The defendant, at a subsequent Court, moved for a new trial without success; and on neither occasion, made any objection to the jurisdiction of the Court. The costs were then taxed, and the amount of damages and costs paid, under protest, to save execution, the defendant proposing to make some further application to the County Court at its next sitting.

All these proceedings took place in the Vacation before Easter Term, and no objection appears to have been made to the jurisdiction of the County Court until the present rule was obtained.

Before entering upon the question of jurisdiction which turned upon the effect of sections 58 and 121 of the 9 & 10 Vict. c. 95, a preliminary objection was made, that the defendant, whose rule to shew cause was not obtained until Easter Term, was too late; as there was, in effect, nothing to prohibit—the trial, the verdict, the judgment, and payment of damages and costs, having been complete, before the prohibition was moved for—and no defect of jurisdiction appeared upon the proceedings.

On the other side, the case of *Roberts* v. *Humby* (a) was cited to shew, that where the applicant for a prohibition could not have moved earlier, he is not too late after sentence and execution, though want of jurisdiction does not appear upon the proceedings.

YATES
PALMER.

Without pausing to inquire what would be the effect of a prohibition where nothing remains to be done to which it could apply, it is sufficient for the present purpose to observe, that it was agreed in that case, as it had been in former cases which were cited, that if a party makes no objection to the jurisdiction of the Court whilst the case is proceeding, apparently acquiesces in the jurisdiction, and suffers the Court to act, without protest or objection, as if it had jurisdiction, down to actual payment of damages and costs; it is too late to apply for a prohibition, even though he had no opportunity to apply to the superior Court earlier; unless the defect appears upon the face of the Upon this ground, therefore, I think that the rule should be discharged; and, as under the circumstances, the defendant could hardly expect to make it absolute, it should be discharged with costs.

Rule discharged, with costs.

The Surveyors of the Highways in the Parish of Bletchingdon v. H. Peyton and H. Styles, Esquires, and the Rev. Thomas Dand (a).

A party claiming an exemption from a highway rate, should appeal against the rate; and if he has allowed the time limited for appeal to expire, be cannot set up the claim to exemption, as an answer to a rule under the 11 & 12

A RULE had been obtained in Easter Term, 1849, under the 11 & 12 Vict. c. 44, s. 5, calling upon H. Peyton, and H. Styles, Esquires, two of her Majesty's justices of the peace in and for the county of Oxford, and upon the Rev. Thomas Dand, to shew cause why the said justices should not issue a warrant of distress, for levying upon the goods of the said Rev. Thomas Dand, a sum of money alleged to be due from him in respect of a highway rate.

(a) This case was decided in Trinity Vacation, 1849.

Vict. c. 44, s. 5, calling upon the justices to issue a distress warrant for levying upon his goods the sum of money alleged to be due from him in respect of that rate.

It appeared, that a rate for the repair of the highways in the parish of Bletchingdon, in the county of Oxford, had been made in the usual form, on the 17th of March, 1848; and on the face of it was regular; by which Mr. Dand was assessed in respect of certain premises occupied by him in the parish. Mr. Dand did not appeal against the rate; and no formal demand of payment was made upon him till February, 1849, when the time for appeal had elapsed. He refused to pay it, and was then summoned to appear before the justices, which he did on the 12th of March, and opposed an application for a distress warrant to enforce it, and claimed an exemption from the rate; for which claim, as the facts appeared upon the affidavits, there were substantial grounds. The justices having heard both parties, declined to grant a warrant, and the above rule was then obtained; against which,

SURVEYORS of Highways of BLETCH-INGON PRYTON.

Montagu Chambers and Pigott shewed cause (a). submitted that the Court will not make this rule absolute, when they see that a bonâ fide claim to exemption from the rate exists. The General Highway Act, 5 & 6 Wm. 4, c. 50, s. 33, enacts, "that when property, or the owner or occupier in respect thereof, has, previous to the passing of this act, been legally exempted from" "the payment" "of highway rate, the said property, and the owners or occupiers thereof, shall be exempt from the payment of the rate hereby imposed." By the express terms of the act, therefore, Mr. Dand, if his claim can be substantiated, is to be exempted from the payment of highway rate under that Will the Court, then, try the question of exemption upon affidavit on an application like the present? It is submitted it will not. The claim to exemption must, therefore, for this purpose, be taken as valid; and, if so, ought Mr. Dand to be prevented from setting it up as an

SURVEYORS of Highways of BLETCH-INGON
PEYTON.

answer to the enforcement of this rate? Yet, if the present order be made, it may be very doubtful whether there could be any appeal against the warrant of distress, by which the question of exemption could be raised. Besides, here the surveyors have mistaken their remedy. They ought to have appealed to the quarter sessions against the decision of the justices, under the 105th section (a). Their refusal to grant a distress warrant was clearly a "determination made," or a "matter or thing done by a justice" "in pursuance of this act," within the meaning of that section. [Wightman, J.—Suppose the justices were to refuse on the ground of exemption, and the surveyors appeal, and the quarter sessions hold the exemption invalid, how are they to recover the rate? They might renew the application to the justices, or at any rate they might then claim the interference of this Court. The quarter sessions is clearly

(a) 5 & 6 Wm. 4, c. 50, s. 105. "That if any person shall think himself aggrieved by any rate made under or in pursuance of this act, or by any order, conviction, judgment, or determination made, or by any matter or thing done, by any justice or other person in pursuance of this act, and for which no particular method of relief hath been already appointed, such person may appeal to the justices at the next general or quarter sessions of the peace to be held for the county, division, riding, or place wherein the cause of such complaint shall arise, such appellant first giving or causing to be given to the surveyor or surveyors, or to such justice or other person by whose act such person shall think himself aggrieved, notice in writing of his intention to bring such appeal, together with a statement in

writing of the grounds of such appeal, within fourteen days after such rate shall have been made. or cause of complaint shall have arisen, and within four days after such notice entering into a recognizance before some justice. with two sufficient sureties, conditioned to try such appeal at, and abide the order of, and pay such costs as shall be awarded by the justices at such general or quarter sessions; and such justices, upon hearing and finally determining the matter of such appeal, shall and may, according to their discretion, award such costs to the party appealing or appealed against as they shall think proper; and their determination in or concerning the premises shall be conclusive and binding on all parties to all intents and purposes whatsoever."

[1849.]

SURVEYORS of Highways

of BLETCH-

INGDON

PEYTON.

the tribunal which the Legislature intended should decide upon the question of exemption, and not the petty sessions; but even if the petty sessions were held to be the proper tribunal to decide, they have already done so in Mr. Dand's The present case would be one of considerable hardship to Mr. Dand, as no demand of payment of the rate was made till after the time for appealing had expired. The case of The Churchwardens of Birmingham v. Shaw (a) will, no doubt, be relied on by the other side. was held that a person, exempt from poor rate, as the occupier of premises belonging to a scientific or literary society, must, if assessed for such premises, contest the liability by appeal; and that his exemption was no answer to an application like the present. But that case is distinguishable from the present. There, the rate was a poor rate, and the appeal is only given against the assessment. Here, the right of appeal is in general terms. There is a recent case of Reg. v. The Justices of Shropshire (b) in this Court; where the rate sought to be enforced was a highway rate; and there a bonâ fide claim to exemption from the rate, was successfully set up as an answer to a rule like the present. [They referred also to Rex v. Dyer (c); Rex v. Greame (d); Rex v. Morgan (e), and Rex v. Mirehouse (f).

Keating, in support of the rule. It is quite true that this Court is not the proper place to try the question of exemption; but Mr. Dand should have appealed against the rate under the 105th section of the act; when the question would have been tried by the proper tribunal, namely, the Court of Quarter Sessions; and having omitted

⁽a) Since reported, 10 Q. B. 868.

⁽b) Q. B. Easter Term, 1849, not yet reported.

⁽c) 2 A. & E. 606; S. C. 4 N. & M. 546.

⁽d) 2 A. & E. 615.

⁽e) Ibid. p. 618, n. (a); S. C. div. nom. 3 N. & M. 68.

⁽f) Ibid. p. 632; S. C. div. nom, 4 N. & M. 394.

Surveyons of Highways of BletchINGION

PEYTON.

to do so, he is concluded from disputing the present rate. Formerly the Court refused, in cases like the present, to enforce the issuing a distress warrant for a rate, by mandamus, where a substantial claim of exemption existed: but that was not out of any tenderness to the party claiming the exemption, who had declined to avail himself of the statutable remedy by appeal; but because they would not, where the legal liability to the rate was doubtful, subject the magistrates to the possibility of an action being brought against them, for obeying the mandate of this Court. Now, however, by the recent act, 11 & 12 Vict. c. 44, s. 5, the justices incur no risk in issuing a distress warrant in obedience to a rule of this Court, commanding them to do so. The case of Churchwardens of Birmingham v. Shaw(a) is an express authority that a party claiming an exemption and having a right of appeal, must appeal against the rate, and cannot set up the exemption as an answer to a rule like the present; and although in that case, it is true it was a poor rate which was sought to be enforced, the principle is the same. Besides, here, it is not at all clear but that the party may appeal under the 105th section to the quarter sessions against the warrant of distress, when issued by the magistrates in obedience to the present rule. If the magistrates had in the first instance issued the warrant of distress. there is no doubt an appeal would have lain; and if Mr. Dand had in that case been held to be precluded from going into his claim of exemption, because he had suffered the period limited to pass without appealing against the rate; he ought not to be put in a better position on the present occasion. In Reg. v. Justices of Shropshire (b), which has been referred to, it did not appear that the time limited for appealing against the rate had expired. distinguishes that case from the present.

Cur. adv. vult.

⁽a) Since reported, 10 Q. B. 868.

⁽b) Q. B. Easter Term, 1849, not yet reported.

The following judgment was afterwards (a) delivered by Patteson, J., for

WIGHTMAN, J.—This was a rule under the 11 & 12 Vict. c. 44, s. 5, calling upon two justices and the Rev. Thomas Dand to shew cause why the justices should not issue a warrant of distress for levying, upon the goods of Mr. Dand, a sum alleged to be due from him, in respect of a highway rate.

The rate was made in the usual manner, and upon the face of it was regular, and Mr. Dand was assessed in respect of certain premises occupied by him in the parish. Mr. Dand claimed to be exempt from payment of the highway rate; and upon the facts appearing upon the affidavits, there were substantial grounds for the assertion of his claim.

He had, however, suffered the time for appealing against the rate, as it affected him, to pass by: and the question is, whether the rule should be made absolute, notwithstanding a real claim to exemption; or whether the surveyors of the highways should apply for a mandamus, upon the return to which the validity of the claim to exemption might be tried.

Two very late decisions were cited upon the argument. One was the case of The Birmingham New Library (b), reported in 18 Law Journal, p. 89 (amongst the magistrates cases), in which the Court decided, that where an occupier of premises, exempt from payment of poor rate, but included and assessed in the rate, had omitted to appeal against it, the justices were bound to issue their distress warrant, notwithstanding an objection on the ground of exemption; and that the occupier must submit to the payment of that rate, and appeal against any subsequent rate that might be made, and which included his premises.

wardens of Birmingham v. Shaw,

SURVEYORS of Highways of BLETCH-INGON 5.

⁽a) In the sittings in Banco, in wardens of Barrinity Vacation, 1849. wardens of Barrinity Vacation, 1849.

⁽b) Since reported, nom. Church-

SURVEYORS of Highways of BLETCH-INGDON 5.
PEYTON.

The other was the case of The Queen v. The Justices of Shropshire (a), decided on the 4th of May, and reported (and I believe correctly) in a publication called The Justice of the Peace, p. 315, in which the Court held, that where a bonâ fide claim to exemption from payment of highway rates was set up as an answer to an application to justices to issue a distress warrant for nonpayment of a highway rate, they would not make a rule absolute upon the justices to issue their warrant; but would leave the surveyors to their remedy by mandamus, to which a return stating the ground of claim to exemption might be made, and the right determined.

But in that case it was not shewn to the Court, that the time to appeal had passed; which distinguishes that case from *The Birmingham New Library* (b), and from the present.

There was, in the present case, primâ facie jurisdiction to make the rate, and unless appealed against, it remains a valid and conclusive rate; and I am unable, in principle, to distinguish this from the case of *The Birmingham New Library*, and that of *Fawcett v. Fowlis* (c). The rule, therefore, will be absolute, and the consequence will be, that Mr. Dand must pay this rate, and avail himself of his right to appeal, if any future assessment be made in respect of the premises in his occupation.

- (a) Q. B. Easter Term, 1849.
- 10 Q. B. 868.
- (b) Since reported, nom. Churchwardens of Birmingham v. Shaw,
- (c) 7 B. & C. 394.

[1849.]

REGINA v. WILLIAM ROBINSON (a).

A RULE for a certiorari to bring up an order for pay- A former ment by the putative father of the expenses of maintenance the merits in of a bastard child, made by justices in a petty sessions held favour of the at Great Marlow, in the county of Bucks; and also an is an answer order of quarter sessions for the county of Bucks, confirming cation, by the the same upon appeal; had been made absolute in Easter bastard child, Term, 1848; and a rule nisi to quash the orders when for an order of maintenance, brought up was, at the same time, by consent, granted.

It appeared that one Christina Simmonds, having been c. 101, s. 3; delivered of a bastard child on the 29th of March, 1847, sessions, and applied shortly after to the magistrates sitting in petty the quarter sessions at Watlington, in the county of Oxford (within appeal, have whose jurisdiction she at that time resided), for a summons to inquire on one William Robinson, the putative father of the child. The case was adjourned several times by the magistrates, decision was, and on the last occasion they inquired of the woman fact, come to; whether she could produce further evidence if they again in their estiadjourned the case, and upon her replying in the negative, mation fails, they dismissed the case for a defect in the evidence. order; and Subsequently she came to reside within the petty sessional division of the hundred of Desborough, in the county of Bucks, and she made a similar application to the justices being upon acting for that division and sitting in petty sessions at fact within Great Marlow, on the 18th of February, 1848. At the diction. hearing, the putative father appeared and objected to the jurisdiction of the petty sessions, on the ground of the order of mainprevious hearing and dismissal of the application by the appellant petty sessions at Watlington. The attorney for the mother raised a preadmitted that she had made a previous application to the jurisdiction

(a) This case was decided in the Vacation after Hilary Term, 1849.

putative father. to an applimother of a under the 7 & 8 Vict. but the petty jurisdiction whether or not such former in point of and, if the proof to make the this Court will not interfere to review a question of

On an appeal against an tenance, the of the petty sessions to make the order: and upon its being

overruled, declined proceeding further with the case: Held, that the sessions were justified in confirming the order, without hearing further evidence, notwithstanding the 8 & 9 Vict. c. 10, s. 6.

REGINA

ROBINSON.

justices at Watlington, but did not admit that it had been refused on the merits. The woman was then examined, but she could only say that the case had been dismissed, but not upon what ground. The attorney for the putative father then offered himself as a witness, but was rejected by the justices, on the ground that he was acting as advocate, and, therefore, could not be a witness in the same case (a). They offered, however, to adjourn the case, in order that the putative father might obtain the necessary evidence, on his paying the costs attendant on the adjournment; which he refused to do. The case then proceeded, his attorney cross-examined the mother, and the justices proceeded to make an order upon him, adjudging him to be the putative father of the child, and ordering him to pay a certain sum for its maintenance. He appealed against this order to the quarter sessions; and on the appeal coming on to be heard at the Easter quarter sessions 1848, for the county of Bucks, he renewed the objection that the petty sessions at Great Marlow had no jurisdiction to make the order, after the hearing and dismissal of the application by the petty sessions at Watlington. The counsel for the respondents contended that there was no evidence before the petty sessions at Great Marlow, upon what ground the application to the justices at Watlington was dismissed; and that it could not be supplied then by calling the clerk of the justices at Watlington to produce the minutes, which the appellant offered to do; and also that the appellant had waived any objection on the ground of jurisdiction, by attending at the sessions at Great Marlow, and cross-examining the mother and her witnesses. The Court of Quarter Sessions overruled the appellant's objection, and proceeded to hear the appeal; whereupon the counsel for the appellant declined to contest the case, and the Court confirmed the order appealed against, without hearing any evidence in support of it.

The order confirming the appeal was in the usual form, and was stated to be made "upon hearing the appeal of the said William Robinson against the said order, and the merits of the matter at large, by counsel upon both sides."

REGINA v. ROBINSON.

Montagu Chambers and T. Sanders shewed cause (a). It is submitted that the petty sessions at Great Marlow clearly had jurisdiction to make the order, which it is now sought to quash. The statute conferring the jurisdiction is the Poor Law Amendment Act, 7 & 8 Vict. c. 101. Sect. 2 enables the mother, within twelve months from the birth of a bastard child, "to make application to any one justice of the peace acting for the petty sessional division of the county," &c., "in which she may reside," for a summons on the alleged father of the child; and such justice shall issue his summons to the alleged father "to appear at a petty session to be holden," &c., "for the petty sessional divison" "in which such justice usually acts." The 3rd section enacts "that the justices in such petty session shall hear" the case, and may adjudge the man to be the putative father, and that he shall pay the expenses of maintenance, The mother, in this case, resided within the "petty sessional division" of Desborough, and the petty sessions at Great Marlow were the petty sessions held for that division. By the express terms, therefore, of the act of Parliament, the petty sessions at Great Marlow were bound to inquire into the matter. Then could the mere fact of a previous application having been made by the mother to another petty sessions, and having been dismissed, oust that jurisdiction? It is submitted it could not. Without going so far as to contend that where an application of this kind has been once made to a petty sessions, and dismissed upon the merits upon a hearing, a fresh application can still be made to another petty sessions under the act; though that construction is not without some support from the consideration

⁽a) In Hilary Term, 1849.

REGINA 5.
ROBINSON.

that on a decision against her, the woman, unlike the putative father, has no appeal given her to the quarter sessions: it is sufficient to observe, that here, there was no evidence before the petty sessions at Great Marlow, that the previous application had been dismissed on the merits; and in the absence of any evidence to that effect, the sessions could not tell but that the previous application might have been dismissed by the sessions at Watlington, upon the ground of want of jurisdiction to entertain it. Suppose a woman were to apply to a petty sessions for a division in which she was not residing, and the justices refused to make an order on that ground, she surely might afterwards apply to the petty sessions for the division in which she actually did reside; Pike v. Davis (a). The petty sessions at Great Marlow were, therefore, right in giving no effect to the objection, without having clear evidence before them of the ground on which the application was dismissed; Reg. v. Bridgman (b); Req. v. Hinchliff (c). Where the Legislature, in creating a summary jurisdiction, has intended to prevent a second application, where a former one has been dismissed; it has done so in express words; as in the case of summary proceedings before a petty sessions for an assault; 9 Geo. 4, c. 31, ss. 27 and 28. The Queen v. Bolton (d) shews, that where the justices have jurisdiction, this Court will not inquire upon affidavit into the merits of their decision; and that the test of the jurisdiction is, whether or not the justices had power to enter upon the inquiry; not whether their conclusions, in the course of it, were true or false.

⁽a) 6 M. & W. 546; S. C. 8 Dowl. 387.

⁽b) Bail Court, Hilary Term, 1846. In this case, the petty sessions, upon their own knowledge, had assumed the existence of a former order of affiliation upon the father, (of which there was no evidence before them); and refused to hear the application of the mother, except upon proof

that the former order had been quashed; and upon application to Williams, J., in the Bail Court, he granted a writ of mandamus. The case was referred to as being reported in the 15 Law Jour., M. C. p. 44.

⁽c) 10 Q. B. 356.

⁽d) 1 Q. B. 66; S. C. 4 P. & D. 679.

But even supposing they had been wrong, the appellant waived his right to take advantage of it, by going into the merits of the case before the justices, and cross-examining the woman and her witnesses; Reg. v. Clarke (a). [They referred also to Reg. v. Abergele (b).]

REGINA 5. BOBINSON.

As to the order of quarter sessions confirming the order of the petty sessions, it is in the usual form, and is quite correct. It is said that evidence in support of the order ought to have been adduced. Where, however, the appellant, on a preliminary objection being decided against him, says he will retire and not contest the case, it would be futile to require that the same evidence should be again gone into. The statute 8 & 9 Vict. c. 10, s. 6, which enacts, that "on the trial" of any appeal against an order of affiliation, the justices in quarter sessions "shall hear the evidence of the said mother, and such other evidence as she may produce, and any evidence tendered on behalf of the appellant;" must be construed with reference to the recital of that section, that by the 7 & 8 Vict. c. 101, it is not specified what evidence the quarter sessions is to hear on the trial of an appeal by the putative father, and that "doubts have been raised as to whether the said mother can be heard by the said Court of Quarter Sessions;" and, therefore, is not to be taken as altering the ordinary rules upon which appeals are conducted, but merely as setting at rest any doubts which might arise as to the competency of the sessions to hear the evidence of the mother herself. And the subsequent portion of the section, that they shall "proceed to hear and determine the said appeal in other respects according to law, but shall not confirm the order so appealed against, unless the evidence of the said mother shall have been corroborated in some material particular by other testimony, to the satisfaction of the said justices," &c.; is to be understood as applying only to those cases

⁽a) 6 Q. B. 349.

⁽b) 8 A. & E. 394; S. C. 3 N. & P. 406.

REGINA v.
ROBINSON.

where the putative father attends and contests the case on the merits. In Rex v. Gage(a), a statute required the conviction to be upon the oath of one or more creditable witnesses; and a conviction upon the defendant's confession was, by a majority of the Court, held sufficient. [They referred also to Paley on Conv. p. 41, 3rd ed.; and to Reg. v. Walker (b).]

Wells, in support of the rule. The petty sessions at Great Marlow had no jurisdiction to hear the case. was proved before them, that a previous application had been made to the petty sessions at Watlington, which had been dismissed. That dismissal was on the ground of insufficient evidence. Such a dismissal is an adjudication on the merits; Reg. v. Evenwood and Barony(c); Reg. v. St. Mary, Lambeth (d); Reg. v. St. Peter's, Droitwich (e). [Erle, J.—Those were cases of defects in the examinations sent with orders of removal, under the Poor Law Acts.] The previous dismissal of the application by the justices at Watlington acted as a sort of estoppel to the inquiry by the justices at Great Marlow, and brought the defendant within the protection of the rule, nemo debet bis vexari pro eâdem causâ. It is obvious that if the Legislature did not mean to give the mother the right of appeal, the construction in question would in effect contravene their intention, by permitting her to make several applications. Under the former act, the 4 & 5 Wm. 4, c. 76, s. 72, the overseers could only make one application for an order in bastardy; for they were bound to come to the quarter sessions next after the child became chargeable. the 2 & 3 Vict. c. 85, they could only go to the petty sessions within three months after the child became chargeable, and where no previous application had been made to the quarter sessions. Under the present act, the mother

⁽a) 1 Stra. 546.

^{145.}

⁽b) Ante, vol. 3, p. 131.

⁽d) 7 Q. B. 587.

⁽c) 3 Q. B. 370; S. C. 3 G. & D.

⁽e) 9 Q. B. 886.

is only authorized to make application "to any one justice," &c.; which seems to contemplate a single application. this be the correct construction of the statute, which it is submitted it is, the petty sessions at Great Marlow had no jurisdiction; and the want of jurisdiction cannot be waived; Lawrence v. Wilcock (a); Jacquot v. Boura (b). In Reg. v. Walker (c), the application was not by the same parties, or for the same cause. In Reg. v. Bolton (d), and Reg. v. Abergele (e), the justices had jurisdiction. In Reg. v. Clarke (f), they had jurisdiction, unless the defendant dissented; and his remaining afterwards and taking a part in the proceedings, was held to be a withdrawal of the [Erle, J.—This case is distinguishable from Lawrence v. Wilcock, and the class of cases of which that is one; for here the petty sessions were the proper tribunal; and the case would seem to come within the principle of Reg. v. Clarke. In Smith v. Sparrow (q) an award was held bad, where the arbitrator having no power to that effect, had examined one of the parties to the submission; and the opposite party was held not to waive the objection by cross-examining the witnesses under protest. referred also to Rex v. Tenant (h), and Rex v. Heath (i).]

As to the order of quarter sessions, it is submitted it is bad for not being made on hearing the evidence of the mother, and some corroborative evidence. The words of the stat. 8 & 9 Vict. c. 10, s. 6, are express, that the sessions "shall hear the evidence of the said mother," &c.; and "shall not confirm the order," &c., "unless the evidence of the said mother shall have been corroborated in some material particular by other testimony, to the satisfaction of the said

REGINA 5.
ROBINSON.

⁽a) 11 A. & E. 941; S. C. 3 P.

[&]amp; D. 536; 8 Dowl. 681.

⁽b) 5 M. & W. 155; S. C. nom. div. 7 Dowl. 331.

⁽c) Ante, vol. 3, p. 131.

⁽d) 1 Q. B. 66; S. C. 4 P. & D. 679.

⁽e) 8 A. & E. 394; S. C. 3 N.

[&]amp; P. 406.

⁽f) 6 Q. B. 349.

⁽g) Ante, vol. 4, p. 604.

⁽h) 2 Ld. Raym. 1423; S. C.

² Stra. 716.

⁽i) 5 A. & E. 343; S. C. 6 N. & M, 345.

REGINA v.
ROBINSON.

justices," &c. In Reg. v. Read(a), an order of quarter sessions, confirming an order under 4 & 5 Wm. 4, c. 76, s. 72, was held bad, for not stating that the corroborative evidence related to some material particular.

ERLE, J.—With respect to the latter objection, I think it cannot prevail. The stat. 8 & 9 Vict. c. 10, s. 6, must be construed with reference to its recital, and the object with which it was passed; and it is plain that it was pointed at the competency of the mother as a witness on the trial of the appeal; and was never meant to interfere with the usual practice adopted in the case of an appeal, where the appellant declines to proceed further with it.

As to the objection to the original order,

Cur. adv. vult.

Afterwards, (in the Vacation after Hilary Term, 1849), the following judgment was delivered by Wightman, J., for

ERLE, J.—A rule to quash an order in bastardy made at a petty sessions, and an order confirming it on appeal made at the quarter sessions, both of which orders had been removed into this Court by certiorari, was moved for on the ground that the question of paternity had been decided upon the merits by a petty sessions in Oxfordshire against the woman, before she applied to the petty sessions in question; that such decision was final, and ousted the jurisdiction of the second petty sessions, and of the quarter sessions. But I am of opinion that this ground cannot be sustained.

When the second petty sessions received the application of a woman resident within their division, they were a tribunal having jurisdiction over the question; and a former decision upon the merits in favour of the putative father was an answer to the application, provided it was made out by evidence. This evidence the petty sessions

(a) 9 A. & E. 619; S. C. 1 P. & D. 413.

were bound to hear and decide on. It is clear that they had jurisdiction to dismiss the application, if the answer was proved; it follows that they had jurisdiction to grant the application and make the order, if the proof in their estimation failed. At the quarter sessions the same principle applies. The appeal on this ground called on the Court of appeal to inquire into it; the appellant claimed the exercise of their appellate jurisdiction to quash the order on proof of this ground; and if the quarter sessions have jurisdiction to try the fact, and decide in favour of the appellant, so have they to decide against him; and the correctness of a decision, either in respect of law or fact, of a question properly brought before them, is not to be reviewed upon removal of their order by certiorari.

The objection that the woman was not examined before the quarter sessions was disposed of on the argument.

Rule discharged.

REGINA v. The INHABITANTS OF BASINGSTOKE (a).

A RULE had been obtained early in Michaelmas Term, 1849, calling upon the defendants to shew cause why the writ of certiorari issued in this prosecution should not be quashed; and why the defendants should not pay to the prosecutors, or their attorneys, the costs occasioned to them in consequence of issuing the said writ, and the costs of this application.

It appeared, from the affidavits in support of the present rule, that an appeal against an order of removal of a pauper

(a) This case was decided in Michaelmas Term, 1849.

REGINA b. ROBINSON.

A certiorari to bring up a case from the essions, was issued in December 1848. on an affidavit of due service of notice on two magistrates, sworn to have been present at the time the order was made. A rule nisi to quash the order of ses sions was obtained on the 8th of May in

Easter Term, 1849, the return to the certiorari being filed nearly at the same time. A rule nisi to quash the certiorari on affidavits denying the presence of one of those magistrates, was obtained in Michaelmas Term, 1849: Held, too late.

[1849.] REGINA Inhabitants of

of the name of Oliver, his wife and children, from the parish of Basingstoke, in the county of Southampton, to the parish of Wooton St. Lawrence, in the same county, came BASINGSTOKE. On for trial at the Midsummer General Quarter Sessions, held at Winchester, in and for the said county, on the 28th of June, 1848, when the order of removal was quashed. That the respondents, the churchwardens and overseers of the parish of Basingstoke, obtained leave to state a case for the opinion of this Court. That the respondents afterwards issued the writ of certiorari, which it was now sought to quash, without giving due notice to two of the justices, by and before whom the order was made, in pursuance of the 13 Geo. 2, c. 18, s. 5. That the notice given was dated the 1st of December, 1848, and was given to John Lucius Dampier, and William Nevill, Esquires, who are described in the notice as being two of her Majesty's justices in and for the county of Southampton, "present" at the quarter sessions, when the order of sessions quashing the order of removal was made; and "then and there acting as such iustices." The affidavit of service of the notice, which was sworn on the 4th of December, 1848, stated "that the said John Lucius Dampier and William Nevill, were present at the general quarter sessions of the peace in and for the said county, where the appeal mentioned in the said notice was heard, and were and are two justices of the peace in and for the said county of Southampton, by and before whom the orders of sessions mentioned in the said notice was made." There were affidavits of several persons, stating with more or less certainty, that Mr. Nevill was not one of the justices present at the time the order was made; and that that gentleman had been applied to himself, and that he had stated that to the best of his belief he was not present. The affidavits were sworn on the 31st of October. 1849.

> The affidavit in answer was made by the attorney for the respondents, who had made the affidavit of service of the notice of the certiorari. It shewed that Mr. Nevill had

been present during some part of the sessions; that the only record of the justices present, was that taken by the deputy clerk of the peace on the first day of the sessions, and that Mr. Nevill's name was there included; that two Courts Basingstoke. were sitting at the same time, and the justices passed out from one to the other, so that it was often difficult to say whether a justice was present during a particular case or not. It stated that he had applied to Mr. Nevill, who could not recollect whether he was present or not. The affidavit shewed that after the case had been granted on the 5th of July, 1848, the deponent "proceeded to obtain a writ of certiorari, for the purpose of bringing the order of the sessions in the matter of the said appeal into this honourable Court, and he, this deponent, afterwards sent a case accordingly to Messrs. Lamb and Brooks, the attorneys of the appellants, for their approval on behalf of the said respondents; and that the said case was subsequently, and in due course, returned by the said Messrs. Lamb and Brooks to this deponent, approved of by them; the said case having been, previous to its being so returned, settled and signed by counsel" on behalf of both parties; and was then forwarded by him to the deputy clerk of the peace, for the purpose of being returned with the writ of certiorari into this honour-

able Court. A rule nisi to quash the order of sessions was obtained on the 8th of May, 1849. The present rule was obtained

early in Michaelmas Term in the same year; against which,

Greenwood and Poulden shewed cause (a). was moved upon the authority of Reg. v. Inhabitants of Cartnorth (b), and Reg. v. Inhabitants of Darton (c); but those cases do not apply. In Reg. v. Cartworth, the affidavit of service of notice to the justices was deficient, in not

VOL. VI. D. & L.

[1849.] Inhabitants of

⁽a) In Michaelmas Term, 1849. 5 Q. B. 201: 3 G. & D. 162.

⁽b) Ante, vol. 1, p. 837; S. C. (c) Ante, vol. 2, p. 492.

REGINA

T.

Inhabitants of BASINGSTOKE.

stating that they were justices "by and before whom" the order of sessions was made. It only stated them to be "two of her Majesty's justices of the peace for the West Riding." Here the affidavit is, "that the said John Lucius Dampier and William Nevill, were present at the general quarter sessions of the peace in and for the said county, when the appeal mentioned in the said notice was heard, and were and are two justices of the peace in and for the said county of Southampton, by and before whom the order of sessions mentioned in the said notice was made." similar remark applies to Reg. v. Inhabitants of Darton (a). There the affidavit merely described them as "two of the justices present at the Midsummer general quarter sessions," "at which sessions, the appeal was heard and confirmed." Those cases are, therefore, widely different from the present. The words of the statute 13 Geo. 2, c. 18, s. 5, are, "that no writ of certiorari shall be granted, issued forth, or allowed," "unless it be duly proved upon oath, that the said party," "suing forth the same, hath" "given six days'notice thereof in writing to the justice or justices, or to two of them. (if so many there be), by and before whom" such order shall have been made. In the cases cited, the condition of the statute was not complied with, and the writs were properly quashed. All the cases shew that the Court look to the materials existing at the time when the writ issued, and not at the time of making the order to quash it; Reg. v. Inhabitants of Gilberdike (b). Here the writ was properly issued, for it was "duly proved upon oath" that notice was given to two of the justices, "by and before whom" the order was made. The question, therefore, arises, whether where a writ of certiorari has issued upon sufficient materials, supposing those materials to be true in fact, the Court will allow the opposite party to come here and shew that those materials are false, and so call upon the Court to

⁽a) Ante, vol. 2, p. 492.

decide upon conflicting affidavits, whether or not the writ should be quashed. There is no case that goes to this extent, and it is apprehended that the Court would not Inhabitants of interfere in such a case, but leave the parties to their BASINGSTOKE. ordinary remedy, by indictment for perjury.

[1849.] REGINA

At any rate, the Court will not interfere in a case like the present, where a considerable interval of time has elapsed; and where the party has lain by and joined in settling a special case for the opinion of this Court, and suffered the parties to incur the expense of preparing for argument. Here, the appeal is tried in June, 1848, the certiorari is issued on the 4th of December, in that year, and the affidavits on which this rule are obtained, are not made till the 31st of October, 1849. How is it possible, after such a lapse of time, for any one to speak with certainty as to who was present at the hearing of a particular appeal? In Rex v. Rattislaw (a), Mr. Justice Patteson seems to have been of opinion, that lapse of time might, in some cases, be a bar to an application like the present. He refers to a case of Rex v. Nicholls (b), and says, "on the authority of that case, (without deciding that in all cases such a motion may be made after any lapse of time), I think this motion was not too late." In the case he refers to, a rule for a certiorari was obtained in Hilary Term, no notice having been given to the justices before obtaining the rule; and a rule nisi to quash it obtained in the Easter Term following, was held in time. Here, nearly a year has elapsed. It is submitted, therefore, that looking to the time that has elapsed, and the expenses which the other party have been suffered to incur in preparing the case for argument, and the difficulty that now exists of proving that the justice served was actually present, the Court will refuse the present application. [They referred also to Reg. v. Justices of Herefordshire (c)].

⁽a) 5 Dowl. 539.

⁽c) Ante, vol. 2, p. 500, n. (a).

⁽b) 5 T. R. 281, n.

REGINA
v.
Inhabitants of BASINGSTOKE.

Crowder and Massey, in support of the rule. The words of the statute are express: "no writ of certiorari shall be granted, issued forth, or allowed," &c., unless two requisites are complied with. First, that it be applied for within six months of the date of the order; and secondly, that it be proved upon oath that six days' notice has been given to two of the justices, "by and before whom" the order was And the necessity of either of these requisites being complied with, stands on the same principle. Rex v. Justices of Sussex (a) it was argued, that the justices having granted a special case, the necessity of giving the six days' notice was dispensed with; but the Court held otherwise; and Lord Ellenborough, C. J., in delivering judgment, says, "admitting that the magistrates may have wished, at the time when they settled the case, to have it brought up, still there may be reasons why they may think fit to shew cause; and unless it can be shewn that it could serve no possible end to give them six days' notice, we cannot so presume. The statute appears to me imperative." That is one of the first cases upon the construction of this statute, and all the succeeding cases have been in conformity with it. In the present case, one of the requisites of the statute has not been complied with. It must be taken upon these affidavits, and indeed is not denied, that one of the justices served was not present at the making the order; and, therefore, the writ ought not to have issued.

As to the application to quash being too late, that objection seems to have been set up in every case in which a motion to quash has been made, but without success. It was urged ineffectually in Rex v. Rattislaw (b); and in Reg. v. Inhabitants of Cartworth (c), the counsel shewing cause objected that nearly a year and a half had elapsed before the motion to quash was made; but the Court did not entertain the objection. Lord Denman, C. J., in that case

⁽a) 1 M. & S. 631, 3.

⁽b) 5 Dowl. 539.

⁽c) Ante, vol. 1, p. 837; S. C. 5 Q. B. 201; 3 G. & D. 162.

does not seem to treat the application to quash in such a case as merely resting on technical defects, and, therefore, to be discouraged; he says, "it is very necessary that the justices who were actually present when the order was Basingstoke. made should be those on whom the notice is served." [Erle, J.—In that case, it appears that the certiorari was not returned till the latter end of one Term, and the rule to quash the writ was obtained in the following Term. . The dates do not appear in Rex v. Rattislaw, but in the case of Rex v. Nicholls (a) referred to and acted upon by my Brother Patteson in that case, the motion to quash was in the Term following that in which the writ was Would you contend that an application to quash a writ for such a defect, might be made after any lapse of time?] It must follow as a necessary consequence, that if the conditions on which the writ is to issue are not complied with, the writ must fail, whenever its validity is questioned. [Erle, J.—The Master informs me, that in one case the Court refused to hear an objection to a defect in the issuing the writ, on the case coming on to be argued in its turn in the Crown Paper. 1 That might be on the ground that it ought to have been made as a separate Here it is not a question of the conduct of the parties, but of the rights of the justices to the notice. Should, however, the Court be of opinion that the lapse of time may be an objection to this rule, it must be recollected that the parties here know nothing of the defect in issuing the certiorari, until the writ comes to be returned; the date of which does not appear upon the affidavits, but must, according to the practice, have been at some time prior to the date of the rule nisi for quashing the order of sessions, which was obtained on the 8th of May, 1849. The parties here, therefore, cannot be said to have misled the other side by settling and signing the special case; for at that time, they could not know but that the writ had been properly issued.

[1849.] REGINA Inhabitants of

Cur. adv. vult.

REGINA

n.

Inhabitants of BASINGSTOKE.

ERLE, J., delivered judgment (a).—As this rule for quashing a certiorari is disposed of on account of the delay, the dates are material.

The case was granted at the sessions in June, 1848. The certiorari was issued in December of the same year, on an affidavit of due service of notice on two magistrates, sworn to have been present at the time the order was made. The rule nisi to quash the order of sessions is dated the 8th of May, in Easter Term, 1849, the return to the certiorari being filed nearly at the same time. The present rule to quash the certiorari, on affidavits denying the presence of one of those magistrates, was issued in Michaelmas Term, 1849.

Upon these dates, I am of opinion that the rule must be discharged.

The proceedings are apparently regular. If a preliminary fact affirmed on one side is intended to be denied by the other, the objection should be taken promptly; both for the sake of truth, while the matter is fresh in recollection, and for the sake of saving waste in preparing for argument. Another reason is, that the objection, when taken by one of the litigant parties, is wholly beside the merits; the notice having been required for the sake of the magistrates, and it being improbable that the magistrates who granted a case in session, should, out of session, decree to prevent it from being heard. It is not necessary to define within what time the objection may be taken; but when a whole Term has elapsed, without objection, after the case has been brought up, the preliminary facts must be taken to be admitted, and the application is then too late.

Rule discharged, without costs.

(a) In Michaelmas Term, 1849.

1848.

GAY v. HALL.
[This case is reported, ante vol. 5, p. 422.]

In re a certain Plaint or Suit in the County Court of Surrey,

Between J. P. Fearon and Another Plaintiffs,

and

C. Norvall - Defendant.

[This case is reported, ante vol. 5, p. 445.]

In re a certain Plaint or Action in the Clerkenwell County Court of Middlesex,

Between Henry Byrne - Plaintiff,

and

Francis Knipe - Defendant.

[This case is reported, ante vol. 5, p. 659.]

In re a certain Plaint or Action in the County Court of Caernaryonshire,

Between David Jones - Plaintiff,

and

ELLIS OWEN - Defendant.

[This case is reported, ante vol. 5, p. 669.]

COURT OF COMMON PLEAS.

Michaelmas Cerm.

IN THE TWELFTH YEAR OF THE REIGN OF VICTORIA.

1848.

HOWDEN v. STANDISH.

The sheriff is bound, in executing a capias (under 1 & 2 Vict. c. 110, s. 3), to provide such a force as will enable him to effect a caption, in spite of any resistance, which he has reason to anticipate.

Although

if the prisoner be rescued, a return of the rescue is good.

The decla-

ration, after stating that a ca. ad resp., issued against K., had been delivered to

CASE against the sheriff of Lancashire for neglecting to arrest one Ludwig Keller, under a capias ad respondendum.

The declaration, after alleging that Keller was indebted to the plaintiff in 2001, for which an action had been brought in the Common Pleas, set out a writ of capias ad respondendum, issued by order of Cresswell, J., directed to the Chancellor of the county palatine of Lancaster, and also a writ under the seal of the county palatine, commanding the sheriff to execute the writ of capias. The declaration then, after alleging a delivery of the writ to the defendant as sheriff to be executed, proceeded to aver that Keller, at the time of the delivery of the last mentioned writ to the defendant, and from thence for a long space of time, expiring within one calendar month from

the sheriff for execution, stated that the sheriff, though often requested, did not take K., and falsely returned, non est inventus. Pleas: first, not guilty; secondly, that K. was not indebted to plaintiff; thirdly, that K. was not in the bailwick; fourthly, that defendant could not have arrested K.: and fifthly, that defendant had not notice that be could have arrested him.

Evidence was offered that plaintiff had directed the sheriff not to arrest K. at a particular

Evidence was offered that plaintiff had directed the sheriff not to arrest K. at a particular time and place: Held, not admissible under any of the issues.

Held also, that the breach of duty of the sheriff was the not arresting when he could and

Held also, that the breach of duty of the sheriff was the not arresting when he could and might, not his omission to arrest after request; and that the allegation, therefore, of the plaintiff's request, was immaterial.

the date of the said first mentioned writ, to wit, for twentyone days then next following, was within the said sheriff's
bailiwick; and the now defendant, as such sheriff, at any
time during that period, could and might, and ought to
have taken and arrested the said Keller, by virtue of the
last mentioned writ, at the suit of the plaintiff; if he, the
defendant, so being such sheriff as aforesaid, would have
so done; whereof the defendant during all that time had
notice.

Breach: that the defendant, not regarding his duty, &c., did not, nor would at any time whilst the same writ was in full force, although often requested so to do, take, or cause to be taken, the said Keller, as by the said last mentioned writ he was commanded; but therein wholly failed and made default. The declaration then proceeded to allege that the defendant, so being such sheriff as aforesaid, afterwards, to wit, on the 13th of August, 1846, falsely and deceitfully returned upon the said last mentioned writ to the said Chancellor, that Keller was not to be found in his bailiwick; and that Keller did not cause special bail to be put in for him in the Court of Common Pleas, according to the exigency of the first mentioned writ of capias, or otherwise observe the requisition of the same, but therein made default; whereby the plaintiff was greatly injured and delayed in the recovery of his debt, &c.

To this declaration the defendant pleaded; first, not guilty. Secondly, a traverse of the alleged debt from Keller to the plaintiff. Thirdly, a traverse of the allegation that Keller was within the defendant's bailiwick. Fourthly, that the defendant, as such sheriff, could not nor might have taken or arrested Keller by virtue of the said writ at the suit of the plaintiff, as in the declaration alleged; concluding to the country. Lastly, that the defendant had not notice that he, the defendant, as such sheriff, could or might have taken or arrested Keller by virtue of the said writ, at the suit of the plaintiff, as in the declaration alleged; concluding to the country. Issues thereon.

Howden v. Standish.

Howden v. Standish.

On the trial before Rolfe, B., at the Liverpool Spring Assizes, 1847, it was proved that the capias was issued on the day it bore date, and that a warrant was delivered to the officer entrusted with its execution on the 8th of July, 1846. On the evening of that day, the officer went to the Zoological Gardens at Liverpool, where Keller was giving a series of public performances of a theatrical character, which were attended by a large concourse of spectators; and at the termination of the entertainment, arrested a person whom he mistook for Keller, but who had been designedly disguised, with a long beard and cloak, to resemble him. On the 10th, another arrest was made in the same gardens, at the conclusion of the performances, and again the person arrested proved to be not Keller, but a person disguised like him. On both occasions Keller appeared upon the stage, but on neither was any attempt made to arrest him there; and Keller effected his escape from the country. The defendant offered evidence to shew that the plaintiff directed the sheriff's officer not to attempt to make the caption, during the time that Keller was on the stage, for fear of a rescue by the bystanders; but to make it after he had left it. The learned Judge, however, ruled that it was the duty of the sheriff to take with him such a force as would enable him to execute the writ; that is to say, such a force as would enable him to overcome any resistance which he could reasonably anticipate: and, by his direction, the jury found a verdict for the plaintiff. On the argument upon the present rule, it was alleged by the defendant, but denied by the plaintiff, that the learned Judge had further held, that as the defendant had not pleaded leave and license, the defence offered was not raised on the record.

Martin, in Easter Term, 1847, having obtained a rule nisi on behalf of the defendant to set aside the verdict, and for a new trial, on the ground of misdirection, and because the verdict was against the weight of evidence;

The Knowles and J. Henderson shewed cause (a). sheriff's duty in such a case as this is clearly defined by Lord Kenyon: "the sheriff was bound to execute the process of the law in the most effectual way: if a person against whom a party had a writ, did not abscond, but continued in the daily exercise of his usual occupation, appeared publicly as usual, was visible to every person that came to him about business, and the bailiff neglected to arrest him, and returned non est inventus to the writ, such was unquestionably a false return; for it was the duty of the bailiff to use every means to search for the defendant, and to make the arrest;" Beckford v. Montague (b). duty of the sheriff to take with him, in executing process, a sufficient force to overcome all probable resistance, short of armed resistance. On this point the following authorities were cited; May v. Proby (c); 2 Wms. Saund. 345, n. (b); Com. Dig. Retorn. (D 6); 2 Inst. 193. Assuming that the Judge did rule at the trial, which, however, is denied, that the defence set up was not admissible under the plea of the general issue; his ruling is in accordance with Wright v. Lainson (d), and Lewis v. Alcock (e). $\lceil Rowe \ v. \ Ames \ (f) \rceil$ was also referred to.]

Howden o.

Martin and Atherton in support of the rule. First, the defence set up was admissible, either under "not guilty," or under the fourth plea. The gist of the action is the false return of non est inventus, when in truth the sheriff might and ought to have effected the arrest. The plea of "not guilty" puts in issue the falsehood of the return; but whether the return was false or not in this case, depended upon whether the plaintiff gave the defendant the instructions which it was proposed to shew he did. For if he did

```
(a) In Hilary Vacation, 1848. 146.
```

⁽b) 2 Esp. 475, 6.

⁽e) 3 M. & W. 188; S. C. 6 Dowl.

⁽c) 6 M.& W.747; S.C.8 Dowl. 389. 750. (f

⁽f) Cro. Jac. 419; S. C. 1 Roll.

⁽d) 2 M. & W. 739; S. C. 6 Dowl. 3

^{388; 3} Buls. 198.

Howden v. Standish.

give such instructions, the sheriff was bound to obey them; and had he executed the writ in defiance of them, he would have been a trespasser; Barker v. St. Quintin (a). If the evidence was not admissible under the general issue, it was so, at all events, under the fourth plea, which denied that the defendant, as sheriff, might have arrested Keller. defendant could only act when authorized by the plaintiff: and, therefore, the direction given by the latter not to execute the writ, suspended the sheriff's power; and, for the purposes of the caption, may be regarded as having taken Keller out of the sheriff's bailiwick. Secondly, the Judge, in directing the jury with reference to the duty of the sheriff, did not advert to the distinction between mesne and final process. It is only in the latter case, that the sheriff is bound to call out the posse comitatus. He may return a rescue upon mesne process; May v. Proby (b); Crompton v. Ward (c); Com. Dig. tit. "Rescous," (D 4); Bac. Abr. tit. " Sheriff," (N 2); 2 Wms. Saund. 345, n. (b).

Cur. adv. vult.

COLTMAN, J., now delivered the judgment of the Court (d).

—This was an action against the sheriff, in which the plaintiff declared against him, setting out a writ of capias, issued by the order of a Judge, against one Keller, and that Keller was within the bailiwick, and that the defendant could and might, and ought to have arrested him, but did not (though often requested) take him or cause him to be taken, and afterwards falsely returned that he was not to be found within his bailiwick. The defendant pleaded, first, not guilty; secondly, that Keller was not indebted to the plaintiff; thirdly, that Keller was not within the bailiwick; fourthly, that the defendant could not nor might have arrested Keller; and fifthly, that the defendant had not notice that he could

⁽a) Ante, vol. 1, p. 542; S. C.

⁽c) 1 Stra. 429.

¹² M. & W. 441.

⁽d) Coltman, J., Maule, J.,

⁽b) Cro. Jac. 419.

Cresswell, J., and Williams, J.

and might have arrested Keller. Upon the trial of the case before Mr. Baron Rolfe, a verdict was found for the plaintiff; and in the following Term, a motion was made for a new trial, on the ground of misdirection, and of the verdict being against the weight of evidence.

It was proved on the trial, that at the time when the warrant came into the hands of the officer to be executed, Keller was engaged in a course of performances which were exhibited in a kind of theatre in a public garden at Liverpool, and which were attended by a large assemblage of spectators; and evidence was offered on the part of the defendant to shew that the plaintiff directed the sheriff's officer not to attempt to make the caption during the time that Keller was on the stage, but to arrest him after he had left it, and was on his way returning home to his lodgings; and the first ground of objection on the motion for a new trial was, that the learned Judge had, as the counsel for the defendant alleged, laid it down that this direction furnished no excuse for the omission of the sheriff to arrest Keller during the performance, as in order to raise such a defence, there ought to have been a plea of leave and license. On the part of the plaintiff, on shewing cause against the rule nisi for a new trial, it was denied that any such doctrine had been laid down as was alleged on the other side; nor is there anything in the report of the learned Judge, which supports the statement of the defendant's In the view we take of this case, it is not very material to determine the controversy between the parties on this point; for we are of opinion that none of the pleas on the record are calculated to raise any defence of the The defendant's counsel contended, hature suggested. that under the plea of not guilty, the direction of the plaintiff not to arrest Keller during the performance, might be given in evidence by way of defence, as far as the nonarrest at that period of the transaction was concerned; but we think this is not so. In the case of Wright \forall . Lainson (a), Howden b.
Standish.

Howden v. Standisti.

which was an action for not having money levied under an execution at the return of the writ, and for returning nulla bona; it was held that the plea of not guilty put in issue only the not having the money ready, and the making the return; so much only being denied by that plea as constituted the wrongful act complained of. The principle of that case is distinctly applicable to the present case. In this case it is alleged in the inducement from which the duty of the sheriff arises, that the writ was delivered to the sheriff; that Keller was within the bailiwick, and that the sheriff might and could have arrested him; whence resulted, as a matter of legal inference, a duty on the sheriff to arrest him; and the wrongful act complained of is, that he omitted to arrest him, and made a return of non est inventus. The plea of not guilty operates to deny the wrongful act complained of; but operating merely by way of denial, it cannot authorize the introduction of affirmative matter in excuse for the breach of duty complained of. It was urged on the defendant's part, that the breach of duty alleged was not simply the not arresting Keller, but the not arresting him, though often requested to do so; and that there was no breach of duty unless the sheriff omitted to arrest after a request to do so; and that the disproving of the request was an answer to the action on the plea of not guilty, as it shewed there was no breach of duty; but we cannot assent to this argument. The breach of duty complained of, is the not executing the writ; when he might and could have done it; and the allegation that he was requested to do so, is an idle and superfluous allegation, which might be struck out as immaterial; and which, though alleged, does not require to be proved. But it was further contended, that under the plea which alleged that the defendant might not nor could arrest Keller, the directions supposed to have been given by the plaintiff were admissible. But the effect of that plea is merely to deny that Keller was in the sheriff's bailiwick under such circumstances that there was an opportunity to arrest him; and we do not see

any ground on which it could be held to let in proof of a direction by the plaintiff not to arrest him. It is not necessary for us to say under what form of pleading the supposed direction could have been rendered available towards the defence of the sheriff; it is enough for the present purpose to say, that there is no plea at present on the record calculated to raise a defence on that ground. The second ground of objection to the summing up was, that the learned Judge laid down the duty of the sheriff in much wider terms than the law authorized. The Judge, as appears by his report, told the jury that it was the duty of the sheriff to take with him such a force as would enable him to execute the writ: that is to say, such a force as would enable him to overcome any resistance which he could reasonably anticipate. On the part of the defendant it was contended, that the writ in this case being a capias issued under the 1 & 2 Vict. c. 110, the sheriff was not bound to take the posse comitatus; and that if the party arrested on such a writ were rescued, and the sheriff returned the rescue, it would be a good return, and no action would lie against him; and in support of this position the cases of May v. Proby (a), and Crompton v. Ward (b), were relied on. There can be no doubt on the authority of those cases, that if the bailiff had in this case effected a caption, and thereupon Keller had been forcibly rescued by his friends or the bystanders, the sheriff would have been excused, and no action would have But the question here, is not whether he would have been excused, if, after a caption effected, the defendant had been rescued; but whether he is not bound to provide such a force as will enable him to effect a caption in spite of any such resistance as he has reason to anticipate. It is to be observed, that the law has always held the sheriff strictly, and with much jealousy, to the performance of his duty in the execution of writs; both from the danger there is of fraud and collusion with defendants, and also because it is

Howden v. Standish.

⁽a) Cro. Jac. 419; S. C. 1 Roll. 388; 3 Buls. 198.

⁽b) 1 Stra. 429.

Howden v. Standish.

a disgrace to the Crown and the administration of justice; if the King's writs remain unexecuted; as appears by statute Westm. 2, c. 39, where it is said with respect to sheriffs: "multotiens etiam falsum dant responsum mandando quod non potuerunt exequi preceptum regis, propter resistentiam," &c., "caveant vice comites de cætero quia hujusmodi responsio multum redundat in dedecus domini regis et coronæ suæ." And it is said in Dalton, 493,—" Note that the sheriff ought to execute the King's writ at his peril, although resistance be made, otherwise he shall be grievously amerced; and besides, the party shall have his action against him, if the writ be not executed, for he might have taken the power of the county with him to have aided him." Accordingly, it was not without much doubt that the return of a rescue was allowed to be a good return in cases where a defendant was arrested on mesne process, and was rescued before the sheriff had been enabled to lodge him in gaol; as appears from the cases above cited. little were such returns favoured, that if a defendant arrested on mesne process were once lodged in gaol, and a habeas corpus issued to bring him to the Chambers of one of the Judges, and on his way thither he was rescued, the sheriff could not return a rescue; Crompton v. Ward (a). ground on which the law was so determined has a distinct bearing on the present question, and is stated thus by Chief Justice Pratt(b). "In the case of mesne process, the sheriff, if he meets the party against whom he has such process by accident, and is told it is the defendant, he is bound to arrest him. And then because it is not supposed that he has always the posse along with him, he is excused against a rescue. But in the present case there is no such danger of surprise, he has notice before, that on such a day he is to bring the party out of prison, and it is his duty, and so he is directed by the writ, to provide for the sure and safe conduct of the party." The reasoning of

this case seems to us to establish the principle laid down by the learned Judge, that the sheriff is bound to provide such a force as will enable him to effect his caption, in spite of any resistance which he has reason to anticipate. It may be said, that if it is the duty of the sheriff to provide such a force as will enable him to effect his caption in spite of any such resistance as he has reason to expect; by parity of reason he ought to provide such a force as will enable him to keep his prisoner, in spite of any such resistance as he has reason to anticipate. But the answer to this is, that the case in which the return of rescue is good, is an exceptional case; being a matter of indulgence to the sheriff, (who cannot always have the posse comitatus with him), in consequence of the possibility that he may be taken unawares, and called upon to execute the writ when he has no sufficient force; and the above cited case of Crompton v. Ward shews that this indulgence, which is at variance with the wholesome jealousy of the law respecting the conduct of sheriffs in the execution of writs, ought not to be extended. Nor can it be considered as any hardship on the sheriff that he should be bound to provide against a resistance which he had reason to anticipate, and with reference to which he was not taken unawares. The only remaining ground of motion was, that the verdict was against the weight of evidence. On this point we have learnt from the learned Judge, that he was not dissatisfied with the verdict; nor do we find, on reading the notes, that there is any reason why he should be so.

Rule discharged.

Howden 5.

1848.

PEART v. The Universal Salvage Company.

The 68th section of the 7 & 8 Vict. c. 110, which empowers the Court or a Judge at Chambers, to order execution to issue against a sharcholder of a registered joint stock company, without suggestion or sci. fa., applies to the 66th as well as to the 67th sections of that act; that is, to actions by other persons as well as shareholders of the company.

In this action the plaintiff was a creditor, not a share-holder, of the Universal Salvage Company, a joint stock company, registered under the 7 & 8 Vict. c. 110; and had recovered judgment against the company. On the 2nd of November, 1848, *Williams*, J., upon the application of the plaintiff, made an order that execution should issue against one Lund, a shareholder.

Willes now, on behalf of Lund, moved for a rule nisi to rescind the order. The order was made under 7 & 8 Vict. c. 110, s. 68; but that section authorizes the Court or Judge only "in the cases provided by this act for execution on any judgment, decree or order," "against the company, to be issued against the person, or against the property and effects of any shareholder or former shareholder of such company, or against the property and effects of the company, at the suit of any shareholder or former shareholder, in satisfaction of any monies, damages, costs and expenses, paid or incurred by him as aforesaid, in any action or suit against the company," to give leave or to order that "such execution" shall issue. The words "at the suit of any shareholder or former shareholder," restrict the provisions of this section to cases arising under the 67th section, which empowers shareholders against whose persons or property execution shall have issued upon any judgment against the company, in pursuance of the 66th section, to recover damages against the company for the loss they shall have thus incurred, and also to sue the other shareholders for contribution. And it is only to those cases that the words "such execution" in the 68th section can properly apply. In the present case, the action is not "at the suit of any shareholder or former shareholder," and it is therefore submitted, that the learned Judge had no jurisdiction to make the order.

Cur. adv. vult.

WILDE, C. J., delivered the judgment of the Court (a).— In this case an application was made to rescind an order made by my Brother Williams, under the supposed authority of the stat. 7 & 8 Vict. c. 110, s. 68; upon the ground that such order was not warranted by the statute. It was contended that the section referred to applied only to judgments in actions "at the suit of shareholders," whereas the present action was at the suit of a creditor. The validity of the objection urged against the order depends upon the construction of the 68th section of the statute; and by that section it is enacted, that in cases provided for by the act for executions against shareholders upon judgments obtained against the company, the Judge may give leave for such execution to issue, without the entry of a suggestion or the issuing of a scire facias. The only section which makes provision for such execution, is section 66. It is, therefore, necessary to have regard to the 66th section, in ascertaining what cases are comprised in the 68th section. By the 66th section it is enacted, that every judgment, order, and decree obtained against the joint stock companies therein mentioned, shall take effect and be enforced, and execution thereon be issued, not only against the effects of the company; but, on failure to obtain satisfaction against the property of the company, also against the persons and effects of shareholders therein particularly described, and against any former shareholders who were shareholders at the time the contract or engagement by which the judgment may have been obtained was entered into, or who became shareholders during the time such contract or engagement was unexecuted or unsatisfied. This section, which is the only one which contains any provision for issuing execution against shareholders, plainly refers to executions on judgments in actions at the suit of creditors, and has no relation to actions between the shareholders themselves, or by the shareholders against the company. The only section that PEART

v.

Universal
Salvage
Company.

PEART 9.
UNIVERSAL SALVAGE COMPANY.

refers to actions at the suit of shareholders, is the 67th section, which enables the shareholder to maintain an action against the company, and to recover contribution for what he may have been compelled to pay by means of an execution issued against him under the authority of the 66th section. The clause then reserves the right of recovering contribution by the ordinary remedy, upon failure to obtain satisfaction under the judgment against the company. That clause neither directly nor impliedly gives or recognises any right or power by one shareholder to maintain an action, or to issue execution against another shareholder; and, therefore, can present no case falling within the 68th section; that section applying only to cases in which the statute had made provision for execution against shareholders. The section in question, the 68th, enacts, that "in the cases provided by this act for execution on any judgment" "in any action" "against the company, to be issued against the person or" "effects of any shareholder" "of such company, or against the" "effects of the company, at the suit of any shareholder," in satisfaction of what he may have been compelled to pay in any action against the company, "such execution may be issued by leave of the Court," without previous suggestion or scire facias. It is insisted, that upon the true construction of this section, the words "at the suit of any shareholder" override and control the whole clause; and, therefore, that the power given to the Judge to dispense with the suggestion or scire facias, is limited to executions "at the suit of shareholders." But this construction, if adopted, would render the clause altogether inoperative; because the section gives authority to dispense with the suggestion and scire facias in cases of execution provided by the act to issue against shareholders; and the only section providing such execution is the 66th, and that plainly refers to execution on judgments at the suit of creditors; and no provision whatever is contained in the act for execution at the suit of shareholders. If, therefore, the words "at the suit of shareholders," as is contended,

1848.

PEART

Ð. UNIVERSAL SALVAGE

COMPANY.

control the whole clause, it can have no operation whatever in regard to executions against shareholders. 68th section related to the 67th only, by which an action is given against the company to recover the reimbursement of what the shareholder may have been compelled to pay by means of an execution under the former section; the provision dispensing with the suggestion and scire facias in such a case could have no operation; because on judgment recovered by a shareholder against the company, neither suggestion nor scire facias would be necessary previous to issuing execution: and thus the clause, according to the construction contended for, would have no application to executions against shareholders, and would be useless and nugatory as regards such executions at the suit of shareholders; and, therefore, entirely inoperative. There is no ground for the construction contended for, and the intention of the Legislature is sufficiently clear. The whole argument arises from the 68th section having extended dispensation of suggestion and scire facias to a case not requiring it, namely, the case of an execution on a judgment at the suit of shareholders against the company. The result therefore, is, that there is no ground for the application.

Rule refused (a).

(a) See Thompson v. The Universal Salvage Company, Exch., Hilary Term, 1849, post.

RICHARDS v. BLUCK.

The declaration, after stating a demise A covenant of a farm by the plaintiff to the defendant, stated the of a farm that following covenant upon which the breach was assigned:— ne would consume on the

he would con-

premises the crops grown thereon, but that in case he should sell any of the crops, which he should be at liberty to do, he would bring to the premises an equivalent amount of manure, is an alternative covenant, and not an absolute covenant, followed by a proviso.

Consequently, the declaration in an action for not consuming the crops on the premises, should set out both branches of the covenant; otherwise it is a fatal variance.

RICHARDS

8.
BLUCK.

that he, the defendant, his executors or administrators, should not nor would, during the continuance of the said demise, impoverish or make barren the said demised premises, or any part thereof, but should and would cultivate and manage the same in a good and husband-like manner; and should and would during the continuance of that demise, spend, consume, and convert into manure, and spread on the said demised premises, or some part or parts thereof, for the improvement of the same, all the vetches, turnips, cabbages, and green crops of all kinds, and all the manure, muck, soil, and compost which should grow or be made from or upon the said demised premises, or any part or parts thereof.

Breach: That the defendant did not, during the continuance of the said demise, &c., spend, consume, and convert into manure, and spread on the said demised premises, or some part or parts thereof, for the improvement of the same, all the turnips which grew thereon; but, on the contrary, &c., the defendant grew on the said demised premises a large quantity, to wit, fourteen acres of turnips, and afterwards, &c., sold off and carried away the same from the said demised premises, without converting the same into manure, and spreading the same thereon, for the improvement of the said premises, pursuant to his covenant in that behalf.

Pleas, inter alia, first, non est factum; issue thereon. Secondly, a traverse of the above breach; issue thereon. On the trial before *Rolfe*, B., at the Staffordshire Summer Assizes, 1848, the plaintiff gave the lease in evidence, when the following appeared to be the covenant on which the action was brought:—

"And also that he, the said Thomas Bluck, his executors or administrators, shall not nor will, during the continuance of this demise, impoverish or make barren the said demised premises, or any part thereof, but shall and will cultivate and manage the same in a good and husbandlike manner; and shall and will during the continuance of this demise,

spend, consume, convert into manure, and spread on the said demised premises, or some part or parts thereof, for the improvement of the same, all the hay, straw, vetches, turnips, cabbages, and green crops of all kinds, and all the manure, muck, dung, soil, and compost which shall grow or be made from or upon the said demised premises, or any part or parts thereof. But in case he or they shall take or sell off any part thereof, which he and they are at liberty to do, then that he or they shall and will, for every ton of hay or straw taken or sold off from the said demised premises, bring back, lay, spread, and spend thereon one ton of rotten stubble muck, or two tons of short manure or night soil; and for every ton of vetches, or of any green crop which shall be taken or sold off from the said demised premises, bring back, lay, spread, and spend thereon, one ton of good stable manure, within the space of three calendar months after the selling or taking off any such hay, straw, or green crop."

It was objected for the defendant, that there was a variance between the proof and the declaration. The learned Judge allowed the objection, and refused the plaintiff leave to amend. The jury, by his Lordship's direction, found for the defendant on the first issue; leave being given to the plaintiff to move to enter the verdict for him on that issue, with 1921. damages.

Whateley now moved accordingly. The latter part of the covenant is a proviso, and not an exception: in pleading, therefore, it is matter which need not be set forth in the declaration, but ought properly to come from the other side; 1 Wms. Saund. 233, a, n. (2). If the defendant in fact sold the turnips, but brought back upon the farm, in compliance with the latter portion of the covenant, any of the substances therein mentioned, that was a matter of defence, and should have come from the defendant. Where a charter party contained a covenant that no allowance should be made for short tonnage, unless such short tonnage was

RICHARDS
v.
BLUCK.

RICHARDS
BLUCK

found on a survey upon the ship's arrival; it was held upon motion in arrest of judgment, that a declaration upon this covenant was good, although not containing an averment that a survey had been taken; that being matter which, in the opinion of the Court, ought to have been shewn by the defendants; Hotham v. East India Company (a). Smart v. Hyde (b), to a declaration upon a warranty of soundness, the defendant pleaded that it had been agreed that the warranty should only remain in force until a certain time, unless a notice of unsoundness was in the mean time given, and that no such notice was given. Upon demurrer, the plea was held good, as not amounting to the general issue. That case resembles the present. In 1 Wms. Saund. 233, b, n. (d), 6th ed., it is said:—"A proviso is properly the statement of something extrinsic of the subject-matter of a covenant, which shall go in discharge of that covenant by way of defeasance: an exception is a taking out of the covenant some part of the subjectmatter of it. If these be right definitions, the plaintiff need never state a proviso, but must always state an exception,"

WILDE, C. J.—I think this covenant is in the alternative. The construction of a contract does not depend upon the order in which its covenants stand, but upon the meaning of the covenants taken together, and according to the object which the parties had in view. Now, what object had the landlord in exacting this covenant? Manifestly that the land should have the benefit of as much manure as should be produced by the consumption of its produce. And how is that object secured? By providing that the tenant shall either consume the hay and other produce on the farm, or bring back an equivalent for what he carries away. Then, in what form have the parties secured that object? The

⁽a) 1 T. R. 638.

⁽b) 8 M. & W. 723; S. C. 1 Dowl. 60, N. S.

covenant states, first, "you shall not remove the crops;" and then, "if you do, which you are at liberty to do, you shall bring on the farm an equivalent benefit." Taking the two clauses together, they seem to me to secure one definite object, and the covenant is in the alternative; and whether you look to the intention of the parties or the fair interpretation of the language, there is no breach of the covenant by removing the crops, if within the specified time the substituted manure was brought upon the land. None of the authorities cited tend to shew that the view taken by the learned Judge at the trial, was wrong. covenant was not set out either according to its legal effect, or in its terms. The case is like a case of libel, where certain matter is stated in one part of a writing, followed by other matter in another part, qualifying it. whole must be set out; and if the qualifying part is not set out in the declaration, there is a variance. So in the present case, I think there was a variance; and looking at the state of the record, I think it was impossible to make an amendment.

1848. RICHARDS BLUCK.

COLTMAN, J., MAULE, J., and WILLIAMS, J., concurred.

Rule refused.

NASH v. Brown.

DEBT. The declaration contained the common counts. That after the accruing of the several debts and are material in a plea are causes of action in the declaration mentioned, and before not rendered immaterial the commencement of this suit, to wit, on the 22nd of by being laid

Dates which under a videlicet (a).

Therefore, where it was material to the validity of a plea that the facts therein stated should have occurred before the passing of an act of Parliament, and the plea did not in terms aver that they did so occur, but stated them to have occurred under a videlicet, on certain days which were in fact prior to the passing of the act: Held, on special demurrer, that these averments of dates were material, though under a videlicet.

(a) See Harrold v. Whittaker, 11 Q. B. 147. Ryalls v. Bramall, ante, vol. 5, p. 753. Ryalls v. Reginam, Exch. Ch. Error from Q. B. Hil. Vac. 1849.

NASH P. BROWN. November, A.D. 1843, a petition for the protection of the defendant from process was duly and according to the statute in such case made, presented by the defendant to her Majesty's Court of Bankruptcy; and thereupon afterwards, and before the commencement of this suit, to wit, on the 29th of January, A.D. 1844, a final order for protection and distribution was made in the matter of the said petition, by Sir C. F. W. Knight, a commissioner of the said Court of Bankruptcy duly authorized in that behalf. And the defendant further saith, that the said several debts and causes of action in the declaration mentioned, and every of them, and every part thereof, were contracted before the date of the filing of the said petition in the said Court of Bankruptcy. Verification.

Special demurrer, assigning for causes, amongst others, that the plea does not disclose any sufficient answer to the action, for the final order in the plea mentioned must be presumed to have been made according to the statutes in force immediately before the commencement of this suit, or at the time of the plea pleaded, viz., the 5 & 6 Vict. c. 116, as amended by the 7 & 8 Vict. c. 96, and that a final order under those statutes only protects the person of the defendant from arrest for the debts and causes of action before the date of filing his petition, and is no bar to an action for recovery of such debts; that if the defendant intended to set up as a defence a final order made after the passing of the 5 & 6 Vict. c. 116, and before the passing of the 7 & 8 Vict. c. 96, the said plea should have distinctly alleged that the said final order was made after the passing of the former act, and before the passing of the latter act; that the said plea is uncertain and ambiguous, and the plaintiff cannot take a safe issue thereon, for that the defendant might prove the said plea by the production of a final order made after the passing of the 7 & 8 Vict. c. 96, which, for the above reasons, would not be an answer to this action; that it is uncertain on what final order the defendant relies, or under what statutes the plea is pleaded; and as the dates in the said plea are all laid under a videlicet, the plaintiff cannot tell with certainty when the said final order was made, &c.

NASH v. Brown.

C. Pollock, in support of the demurrer. The plea is It is admitted that it would be a good plea under the 10th section of the 5 & 6 Vict. c. 116, which provides that a plea stating the presentment of a petition, and a final order for protection and distribution, shall be a good plea in bar to any action for any debt contracted before the filing of the petition; but the final order under 7 & 8 Vict. c. 96, s. 22, only protects the person of the debtor, and cannot be pleaded in bar of an action; Toomer v. Gingell (a). [Williams, J.—The order described in the plea is not an order under the later act, but an order "for protection and distribution," which means an order under the 5 & 6 Vict. c. 116.] Such an order cannot now be made; and the words of the plea, notwithstanding their identity with those of the 10th section of the 5 & 6 Vict. c. 116, must be held in legal effect to refer to the only order which can be made, that is, an order under the later act. It has, indeed, been decided by the Court of Exchequer in Platel v. Bevill (b), and Jacobs v. Hyde (c), that a plea in this form would be proved by an order under the 7 & 8 Vict. c. 96; but assuming those decisions to be right, the present plea is still bad on special demurrer, for not pointing out under what statute the plea is pleaded, or upon what final order the defendant relies. The dates are all laid under a videlicet, and, therefore, need not be proved as laid. [Williams, J.—If the plea could not have been proved by a final order under the later act, the time is material, although laid under a videlicet; Bissex v. Bissex (d).] If the time be parcel of a contract, it is material, though laid under a videlicet; so if the time laid be inconsistent with the facts stated in the plea, it is regarded as material, so far as to

⁽a) 3 C. B. 322; S. C. ante, (c) Since reported, ante, p. 8, vol. 4, p. 182. (b) Since reported, ante, p. 2; (d) 3 Burr. 1729.

⁽⁰⁾ Since reported, ante, p. 2;

S. C. 2 Exch. 508, 511.

Nash v. Brown. make the plea demurrable. But here, there would be no such apparent inconsistency, unless the Court takes judicial notice of the day upon which an act of Parliament came into operation, which, it is submitted, it will not do.

Petersdorff, contrà. If the plea be taken to be pleaded under the 5 & 6 Vict. c. 116, it is a good plea; Cook v. Henson (a): and it is clear, from its terms, that it is so pleaded. The Court will take notice of the state of the law at any given time; and will, therefore, understand a petition presented in November, 1843, to have been presented under the 5 & 6 Vict. c. 116, and not under an act which was not then in existence. The time stated in any pleading must be taken to be consistent with the facts pleaded; and if the time be material, it cannot be rendered immaterial by being laid under a videlicet; Grimwood v. Barrit (b). It is not objected that the dates as they now stand are inconsistent with the plea; but because they are under a videlicet, the plaintiff contends that he is entitled to substitute any inconsistent dates in their place, in order to make out that the plea is bad. But the plea is good under the 7 & 8 Vict. c. 96, as well as under the earlier Toomer v. Gingell (c) has been overruled by Jacobs v. Hyde, (d) and Platel v. Bevill (e). [Maule, J.—Then is not the plea bad for omitting to allege that the facts occurred after the passing of the later act?] It would be so if the first act had been repealed by the second, which it was not; but even if it was, the plea would, for the reasons already given, be a good plea under the 5 & 6 Vict. c. 116.

C. Pollock, in reply, referred to Parkinson v. White-head (f).

```
(a) 1 C. B. 908; S. C. ante, vol. 3, p. 177.
```

⁽b) 6 T. R. 460.

⁽c) 3 C. B. 322; S. C. ante, vol. 4, p. 182.

⁽d) Since reported, aute, p. 8,

n. (b); S. C. 2 Exch. 508.

⁽e) Since reported, ante, p. 2; S. C. 2 Exch. 508, 511.

⁽f) 2 M. & G. 329; S. C. 2 Scott, N. R. 620.

COLTMAN, J.—I am of opinion that this is a good plea. If the facts stated took place at the times at which they are averred in the plea to have taken place, it is admitted the plea is a good answer to the action. I therefore think the time is a material averment, and traversable; and it is, consequently, not necessary to consider the effect of the 7 & 8 Vict. c. 96.

NASH v. Brown.

Maule, J.—I also think the plea is good. A material averment, though laid under a videlicet, must be proved as laid. If a plea alleges that an event took place after the passing of one statute, and before the passing of another, the allegation will be proved by shewing that the event took place at any time in the interval between the passing of the two statutes; so if the plea allege that the event occurred on a certain day, the day so stated is material, and the case of Bissex v. Bissex (a) shews that it is not the less material for being laid under a videlicet. In order to make this plea good, it was necessary to shew that the transaction took place under the act applicable to the case; and this is done in no other way than by stating that it took place on a particular day. The day, then, is material, and the videlicet does not make it immaterial.

WILLIAMS, J.—I am of the same opinion. Since Bissex v. Bissex, it has never been doubted, even on special demurrer, that when a material averment is under a videlicet, that averment is traversable. This plea contains a positive averment of the dates of the transaction, and those dates are material, and, therefore, traversable. The question upon which more doubt has arisen is, how far an immaterial averment is rendered material by the omission of the videlicet; but the point here is free from difficulty.

Judgment for the Defendant.

(a) 3 Burr. 1729.

1848.

RICHARDS v. BLUCK (a).

If the amount of money paid into Court by the defendant, exceeds 40s., the plaintiff is entitled to his costs; although the Judge, at the trial, certifies that the jury have "found a verdict for ls. and no more."

COVENANT. The declaration assigned seven breaches, to four of which a nolle prosequi was entered, and 10L was paid into Court and accepted by the plaintiff, in satisfaction of another. Upon the two remaining breaches the jury, on the trial before Rolfe, B., found a verdict for the plaintiff, damages 1s.; and the learned Judge thereupon gave the following certificate, which was indorsed on the record:

"I hereby certify that the jury in this cause found a verdict for 1s., and no more.

R. M. ROLFR."

Hugh Hill having, on an earlier day in this Term, obtained a rule to shew cause why the Master should not tax and allow the plaintiff's costs in the action, notwithstanding the certificate.

Whitmore now shewed cause. The payment of 10L into Court does not take this case out of the 43 Eliz. c. 6. The 2nd section enacts, that if it shall appear to, and be signified by the Judge at the trial, "that the debt or damages to be recovered shall not amount to the sum of 40s.," the Judge shall award no more costs than the debt or damages amount to, but less at his discretion; and here the Judge has found that 1s. only was "to be recovered." [Coltman, J.—The words in the statute "to be recovered," must mean sought to be recovered.] Although there is no express decision upon the construction of this act, another statute, the 43 Geo. 3, c. 46, which gives defendants who have been

⁽a) This was another action of covenant, (see ante, p. 325), by the same plaintiff against the same defendant.

arrested on mesne process their costs, when the plaintiff "shall not recover" the sum for which the arrest was made, has received a judicial interpretation similar to that now contended for. In Rowe v. Rhodes (a), the Court of Exchequer, after reviewing the earlier decisions on that statute, held that money paid into Court was not money recovered within the meaning of the act, which was held to apply only to money recovered by a verdict. That case was followed in Brooks v. Rigby (b).

1848. RICHARDS BLUCK.

Whateley and Hugh Hill, in support of the rule. admitted that the plaintiff is entitled to his costs under the Statute of Gloucester, and the question is, whether he is deprived of them by the 43 Eliz. c. 6. The preamble of the latter act clearly points out the evil which it was passed to remedy, the prosecution of "small and trifling suits;" and its object is well explained by Dennison, J., in the case of Walker v. Robinson (c). "This statute," says that learned Judge, "was intended to explain the Statute of Gloucester, which was evaded by laying the damages in the declaration above 40s., and was to enforce the true meaning of the Statute of Gloucester, and therefore enacted, that if the Judge would certify that the damages given were the proper damages, and which the jury ought to give, and no more, so that it might appear that the action ought properly to have been brought in an inferior Court, then the superior Court was to allow no more costs than damages." This action was brought for more than 40s., and more than 40s. have been recovered by it. The record shews that 10L and 1s. have been recovered; and the statute is not in terms, nor, having regard to its object, can it be, by any fair construction, limited, to sums recovered by verdict. The argument derived from the construction put upon the 43 Geo. 3, c. 46, is fallacious; for that act is in no respect

⁽a) 2 Dowl. 384; S. C. 2 Cr. (c) 1 Wils. 95. & M. 379.

⁽b) 2 A. & E. 21; S. C. 4 N.

RICHARDS 9. BLUCK. analogous to the Statute of Elizabeth. The certificate, therefore, is a nullity; for it does not certify the amount recovered in the action, but only the amount found by the verdict. [Harrison v. Watt (a) was referred to.]

COLTMAN, J.—I am of opinion that this case is not within the Statute of Elizabeth. The object of that statute was to prevent trifling and frivolous suits being brought in the superior Courts, which might have been brought in inferior Courts; and the test for ascertaining whether the case be within the statute, seems to be, what is the amount which the Court can see the action is brought for. section of the statute enacts, that if it shall appear to the Judge at the trial, and shall be signified by him, that the debt or damages to be recovered in the action are under 40s., the Judge shall not award him greater costs than such debt or damages amount to; and the question is, whether the Court can see in the present case that the debt or damages did not amount to 40s. The record, however, shews that the plaintiff recovered 10L in addition to the 1s. found by the verdict; and, therefore, I do not think that the Court is restricted by the statute from giving the plaintiff his costs; but, on the contrary, that the Court ought to award the plaintiff his full costs.

MAULE, J.—Where the plaintiff sues for more than 40s., and recovers more than that sum, the statute does not apply; and I do not think that a plaintiff can be said not to have recovered more than that amount, when he has in fact got more by means of his action.

WILLIAMS, J., concurred.

Rule absolute.

(a) 16 M. & W. 316; S. C. ante, vol. 4, p. 519.

1848.

Young v. Geiger.

DEBT for work and labour done, and for medicines and An apothecary attendance supplied and given by the plaintiff, as a surgeon and apothecary, for and to the defendant, at his request.

Pleas: first, nunquam indebitatus; and secondly, a set-off. plied within Upon the trial before Williams, J., at the Middlesex sittings during Trinity Term, 1847, it appeared that the action was brought for 30% for the plaintiff's medical certificate of services, and for medicines supplied to the defendant at his residence in the neighbourhood of Regent's Park, and to practise to within ten miles of the city of London (a).

(a) The 55 Geo. 3, c. 194, (an Act for better regulating the practice of Apothecaries throughout England and Wales), enacts,

Sect. 14. That " to prevent any person" "from practising as an apothecary, without being properly qualified to practise as such," "it shall not be lawful for any person" "to practise as an apothecary in any part of England or Wales, unless he" "shall have been examined by the said Court of Examiners," "and have received a certificate of his" " being duly qualified to practise as such from the said Court of Examiners" "as aforesaid, who are hereby authorized and required to examine all person and persons applying to them, for the purpose of ascertaining the skill and abilities of such person" "in the science and practice of medicine, and his" "fitness and qualification to practise as an apothecary; and the said Court of Examiners" " are hereby empowered either to reject such person," "or to grant a certificate of

VOL. VI.

such examination, and of his" "qualification to practise as an apothecary as aforesaid."

Sect. 15 enacts, "that no per- the defendant son shall be admitted to any such to deliver a examination," "unless he shall his set-off, and have served an apprenticeship of ordering that not less than five years to an "in default apothecary, and unless he shall defendant shall produce testimonials to the satis- be precluded faction of the said Court of Ex- from giving aminers, of a sufficient medical in support of education, and of a good moral conduct."

Sect. 19 enacts, "that the sum of ten pounds ten shillings shall admissible at be paid to the said Master, War- the trial. dens, and Society of Apothecaries, for every such certificate as aforesaid, on obtaining the same, by every person intending to practise as an apothecary within the city of London, the liberties or suburbs theroof, or within ten miles of the same city; and the sum of six pounds six shillings by every person intending to practise as an apothecary in any other part of England or Wales,

medical attendance and medicines sup-London, although his qualification in terms restricts his authority The plaintiff's England and Wales, except the city of London, and ten miles from it.

A Judge's order requiring such s the trial," renders such evidence inYoung b. Geiger.

certificate, for which he had only paid six guineas, was produced, and was in the following words:—

"We do hereby certify that Thomas Young is duly qualified to practise as an apothecary, and is hereby entitled to practise as such in any part of England and Wales, except the city of London, and the liberties or suburbs thereof, or within ten miles of the said city."

It was objected for the defendant, that as the plaintiff was not licensed to practise within the district in which the cause of action arose, he could not recover. The counsel for the plaintiff referred to *Chadwick* v. *Bunning* (a), and the learned Judge having overruled the objection, the jury found for the plaintiff 141. 10s. damages, leave being reserved to the defendant to move to enter a nonsuit.

A rule nisi having been accordingly obtained,

Byles, Serjt., and Wordsworth, shewed cause. The certificate is sufficient to enable the plaintiff to maintain this action. The 21st section does not require that the apothecary shall prove payment of the fees imposed by the 19th; it only requires that before he shall recover in

(except the said city of London, the liberties or suburbs thereof. or within ten miles of the said city); and no person having obtained a certificate to practise as an apothecary in any other part of England or Wales (except the said city of London," &c.), "shall be entitled to practise within the said city of London," &c., "unless and until he shall have paid to the said Master, Wardens and Society, the further sum of four pounds four shillings, in addition to the said sum of six pounds six shillings so paid by him as aforesaid, and shall have had endorsed on his said certificate a receipt from the said Master," &c., " for such additional sum of four pounds four shillings."

Sect. 20 imposes a penalty of 20l for practising as an apothecary "without having obtained such certificate as aforesaid."

Sect. 21 enacts, "that no apothecary shall be allowed to recover any charges claimed by him in any Court of law, unless" he "shall prove on the trial that" "he has obtained a certificate to practise as an apothecary, from the said Master, Wardens and Society of Apothecaries as aforesaid."

(a) 2 C. & P. 106; S. C. R. & M. 306.

an action, he shall prove "that he has obtained a certificate to practise as an apothecary." This was done in the present case by the production of a certificate authorizing him to practise; and if it was illegal for him to practise within ten miles of the city, without paying the additional fee of four guineas, that defence does not arise under the general issue, but should have been specially pleaded. The 19th section is not worded like the 21st. It does not enact that no person shall recover until he proves payment of the fees, but only that no person shall be entitled to practise until he shall have done so; and although the plaintiff may be liable to a penalty under the 20th section for omitting to pay the higher fee, his right to recover in the present action is not affected. The Legislature did not intend to create one class of practitioners for the metropolis, and another for the country. The examination for town and country practitioners is the same; each candidate, after he has passed his examination, is at liberty to take out his certificate either for town or country.

Parry, in support of the rule. The plaintiff was bound, under the 21st section, to produce a certificate authorizing him to practise at the place where he did practise; and, as proof of this was a condition precedent to the plaintiff recovering in the action, it was unnecessary to put a special plea on the record to raise that question. If the Apothecaries' Company had given him a general certificate, as appears to have been done in Chadwick v. Bunning, that case would have been, it is admitted, an authority for the plaintiff; but as the judgment of Lord Tenterden relies chiefly on the generality of the certificate, it may be inferred, that if the certificate had been limited, like the present one, the decision would have been different. The certificate required by the 21st section to be proved at the trial must be, it is submitted, such a certificate as is mentioned in the 19th section.

Young F. Geiger. Young 9. Griger. COLTMAN, J. (a).—I think this rule should be discharged. The object of the 21st section of the act was to protect the public against practitioners not duly qualified—not to protect the revenue of the Apothecaries' Company; and, therefore, when a person has obtained the certificate required by the 14th section, he has, in fact, a sufficient certificate under the 21st section to enable him to maintain an action. The question, therefore, as to the necessity of a special plea does not arise.

MAULE, J.—I am also of opinion that this rule must be discharged. The ground upon which it was obtained was, that the plaintiff had failed to comply with the 21st section, in not producing at the trial such a certificate as is required by that section. That section requires the plaintiff to prove at the trial that "he has obtained a certificate to practise as an apothecary from the said Master," &c. "of apothecaries as aforesaid." The words "as aforesaid" refer, I think, to the word "obtained;" and the meaning of the whole section is, that he shall not recover unless he proves that he has obtained, by the proceeding before mentioned, a certificate of fitness to practise from the Apothecaries' Company. At the trial, the plaintiff proved a certificate, stating that he was qualified to practise, but limited as to the place where he might practise, that is to say, to any part of England and Wales, except the city of London, or within ten miles of it; and it was contended by the defendant, that as the work was done, and the medicines supplied in London, the certificate did not satisfy the exigency of the 21st section. But, I think, looking at the words of that section, and the scope and object of the act, that it has been complied with. The 14th section, which requires that apothecaries shall not practise until they have been examined and have received a certificate of their qualification, makes no distinction between the metropolis and the

⁽a) Wilde, C. J., was absent from illness.

rest of England and Wales; and the 15th requires the candidate to produce testimonials of his medical education and good conduct before being examined. Now, it is clear from these two sections, that a person who satisfies the examiners of his ability and fitness to practise as an apothecary, is considered by the act as competent to practise as an apothecary, and the Apothecaries' Company are bound to give him a certificate. The statute does not contemplate that a person shall be qualified to practise in one place, and not qualified for another place. The 19th section, it is true, enacts, that a person intending to practise in London shall pay 10l. 10s., and a person intending to practise elsewhere 6l. 6s.; and that no person who has got a certificate to practise in the country, shall be entitled to practise in London, until he has paid 41. 4s. But this seems to me a mere fiscal regulation for the benefit of the Apothecaries' Company, which they may enforce or not as they please. The 20th section, which imposes a penalty on persons practising without a certificate, seems to refer to those certificates which are mentioned in the 19th section. Then the 21st section, the one in question, enacts, that an apothecary shall not recover unless he proves that he has obtained "a certificate" "as aforesaid," which means, I think, that he has obtained a certificate in manner aforesaid. The spirit of the act is in favour of this construction, and the letter does not prevent its adoption.

WILLIAMS, J.—I think the certificate was sufficient. But, at all events, the defence relied upon was not admissible under the general issue.

Rule discharged.

Before the trial, the plaintiff had obtained a Judge's For marginal order in the usual form, requiring the defendant to deliver p. 337. particulars of his set-off, and ordering, that in default thereof, the defendant should be precluded from giving any evidence in support of such set-off at the trial. The

1848. Young GEIGI B.

1848. Young GRIGER. defendant did not comply with the order, but at the trial proved an I. O. U., signed by the plaintiff for 15L 10s. The learned Judge gave the plaintiff leave to move to increase the verdict by that amount.

Byles, Serjt., having obtained a rule nisi,

Parry shewed cause, and contended, that as the Judge's order was not part of the record, the defendant was not precluded from giving evidence in support of any issue on the record. He referred to Payne v. Davis (a); but admitted that Ibbett v. Leaver (b) was against him.

PER CURIAM.

Rule absolute.

(a) 9 Jurist, 734.

(b) 16 M. & W. 770; S. C. ante, vol. 4, p. 716.

HOPWOOD v. WHALEY.

Where the rent of premises exceeds their value. the executor of the lessee is, after entry, personally liable for the amount of profit which, by due diligence, he might derive from them.

The first count of the declaration stated, that by an indenture of lease made between the plaintiff of the one part, and one William Whaley of the other part, a messuage and premises were demised by the plaintiff to the said W. Whaley, his executors, administrators and assigns, for twenty-one years, from Christmas, 1834, at the rent of 90L a-year, payable quarterly: that all the estate

In debt for rent against an executor as assignee of his testator, defendant pleaded in discharge of his liability otherwise than as executor, that he had entered as executor; that he had not derived any profit from the premises; that the premises had not yielded any profit since the testator's death; that the premises had vested in him only as executor, and that he had no assets. Replication: that the premises had vested in him only as executor, and that he had no assets.

Replication: that defendant had derived profit, and that the premises had yielded him profit, to wit, to the amount of the rent. Held, that the plea must, after verdict, be understood as denying not only that the premises had, but also that they could have yielded any profit.

Therefore, it appearing at the trial that the defendant had not, but that he might have, derived profit from the premises.

derived profit from the premises,

Held, that the defendant was not entitled to a verdict on the issue upon the plea; but Held also, that the plea might be read distributively, that is, as a plea of no assets to each part of the plaintiff's demand; and therefore, that the verdict might be found for the plaintiff for a part only of the debt laid in the declaration.

and interest of the said W. Whaley afterwards became vested in the defendant by assignment; that defendant entered, and that afterwards and during the term, and while defendant was possessed, the sum of 2471. 10s. for rent of the demised premises for nearly three years, from June, 1843, to March, 1846, became due and was in arrear. There was a second count on an account stated.

Plea to the first count: that defendant ought not to be charged with the said rent so due and owing, or any part thereof, otherwise than as the executor of the last will and testament of the said W. Whaley, deceased, because the said W. Whaley, since deceased, in his lifetime, to wit, on, &c., made his last will and testament in writing, and thereby constituted and appointed the defendant executor thereof; and afterwards, and after the making of the said indenture, and during the term thereby granted, to wit, on the 27th of March in the year last aforesaid, the said W. Whaley died possessed of the said premises, without having revoked or altered his said will; after whose death, to wit, on the 20th of June, 1843, the defendant duly proved the said will, and took upon himself the burden of the execution of the same; that afterwards, to wit, on, &c., the defendant as such executor as aforesaid, entered into and upon the said demised premises, and became and was possessed thereof for the residue of the said term by the said indenture granted; that the defendant has not at any time since the death of the said W. Whaley had, received, or derived any profit, interest, or advantage as such executor or otherwise, by or from the said demised premises, with the appurtenances, or any part thereof; and that the said demised premises, with the appurtenances or any part thereof, have not, since the death of the said W. Whaley, yielded any profit whatever; that the estate and title, right, and term of years of the said W. Whaley, of and in the said demised premises, with the appurtenances or any part thereof, did not at any time come to or vest in the defendant by assignment, otherwise than as such

Hopwood b. Whaley. Hopwood

b.

Whaley.

executor as aforesaid; and that the said entry of the defendant in the declaration mentioned was made by him as such executor as aforesaid. And that defendant has not, nor at the time of the commencement of this suit, or at any other time since, had any goods or chattels of the said W. Whaley deceased, at the time of his death, in the hands of the defendant, to be administered. Verification.

Replication to that plea: that the defendant did, after his entry into and upon the said demised premises, have, receive, and derive great profit, interest, and advantage by and from the said demised premises, with their appurtenances and every part thereof, which have yielded to him great profit, to wit, to the amount of the said rent in and by the said first count sought to be recovered. Issue thereon.

Plea to the second count, never indebted. Issue thereon. Upon the trial before Williams, J., at the Middlesex sittings after Trinity Term, 1847, a lease, dated February, 1835, was produced, whereby the messuage and premises in question were demised to the testator for twenty-one years, computed from Christmas, 1834, at the annual rent of 90L, payable quarterly. The testator paid the rent up to Christmas, 1842, and died in the month of March, 1843. The defendant, his executor, proved his will, and personally occupied the premises until the Midsummer following, down to which time he paid the rent reserved. He then ceased to reside on the premises, and tried, though ineffectually, to let them. In Easter Term, 1846, the plaintiff recovered possession of them by ejectment, and the present action was brought for rent reserved, which had accrued due from Lady Day, 1843, to Midsummer, 1846, amounting to 247L 10s. It was contended for the defendant, that the issue between the parties was, not whether the premises might have been productive of profit generally, but whether the defendant, as executor, had actually derived any profit from them. Evidence was given by the plaintiff that the premises might have been let by the executor at 60L a-year, and it was contended that he was entitled to a verdict for the full amount of the rent reserved, or at least for two years and three quarters, at 60l. a-year. The learned Judge left the following questions to the jury: first, did the defendant in fact derive any profit or advantage from the premises as executor; and, if so, to what amount? and secondly, could the defendant, by the exercise of reasonable diligence, have derived any profit or advantage from them; and, if so, to what amount? The jury, in answer to the first question, found that the defendant had derived profit from the premises for a quarter of a-year, to the amount of 221 10s., and in answer to the second, that the defendant, by the exercise of due diligence, might have let the premises for 60% a-year for two years and three quarters, amounting to 165L A verdict was then found for the plaintiff for the full amount claimed in the declaration, and leave was reserved to the defendant to move to reduce that sum to 165L, or to 22L 10s., or to enter the verdict for him.

Talfourd, Serjt., in Michaelmas Term, 1847, obtained a rule to shew cause why the verdict should not be entered for the defendant, or why the damages should not be reduced to 165L, or to 22L 10s., or to 1s.

Channell, Serjt., and Bramwell, shewed cause. First, the plea to the first count was disproved, even if it raised the question of the defendant's having actually derived profit from the premises; for the jury found that he had derived profit from them. It is true that the amount of such profit was found to be only 22l. 10s., but the question of amount was not raised by the pleadings; the only ouestion was, whether the defendant had derived any profit, and that being found in the affirmative, the defence set up failed, and the plaintiff was entitled to the full amount claimed by his declaration. But, in the next place, the

Horwood b. Whaley. Horwood 9. WHALEY.

plea, in order to be good, must be understood as denying not merely that the defendant actually derived, but also that he might, by the exercise of due diligence, have derived profit from the premises, and will therefore be so understood after verdict. But the jury have found that a profit of 1661, might, by due diligence, have been made of the premises; and the verdict must, at all events, stand for that amount. Rubery v. Stevens (a) is an authority to shew that the plea must, in the present stage of the proceedings, be so understood. To measure the defendant's liability by the amount of profit actually received by him, and not by the amount which but for his own negligence he might have received, would in effect be to enable him to take advantage of his own wrong; and would be opposed to Hornidge v. Wilson (b), where it was held that as between the lessor of the testator and the administrator the latter could not, upon the question of the value of the demised premises, take advantage of his own breach of covenant to repair, which had reduced their value; but that the value must be taken at what the premises would have been worth, if the covenant had not been broken. The neglect of the defendant in the present instance amounts to a devastavit; for "such acts of negligence or careless administration, as defeat the rights of creditors, or legatees, or parties entitled to distribution, amounts to a devastavit;" Wms. Exors. 1417, 3rd ed.; 1535, 4th ed.; and here there has been negligence defeating the right of a creditor. In Tremeere v. Morison (c), Bosanquet, J., says, "The general rule is, that the executor of a lessee is liable as assignee, except that, with respect to rent, his liability does not exceed what the property yields," that is, what it might with proper care be made to yield. [Maule, J.-The plea says only that the premises yielded no profit, not that they

⁽a) 4 B. & Ad. 241; S. C. 1 N. & D. 641.

[&]amp; M. 182. (c) 1 Bing. N. C. 89. 99; S. C.

⁽b) 11 A. & E. 645; S. C. 3 P. 4 M. & Scott, 603.

were of no value]. Further, the plea only denies that the defendant had assets at the commencement of the suit, without negativing, his having had assets before that time, and is therefore bad; *Reid* v. *Lord Tenterden* (a).

Lastly, the rule has been obtained to reduce the damages, not the debt, and therefore the 247l. 10s., which is the debt found by the verdict, is not by this rule sought to be disturbed. Besides, there is no plea of never indebted to the first count, and the amount is not in issue. In Macintosh v. Weiller (b), it was doubted whether the plaintiff, in an action of debt, was bound to give any evidence of his debt when the only plea on the record was payment, and the defendant did not appear to support the plea.

Hayes (Talfourd, Serjt., was with him) in support of the The substantial question is, what is the extent of the defendant's liability as executor. He could not waive the term unless he renounced the executorship. In Wollaston v. Hakewill (c), the Court says that an executor "may, by proper pleading, discharge himself from personal liability, by alleging that he is no otherwise assignee than by being executor, and that he has never entered or taken possession of the demised premises; and, as is well known, from all liability as executor, by alleging that the term is of no value, and that he has fully administered all the assets which have come to his hands." Here, it is true, the executor has entered; but even in that case it has been held that to an action in the debet and detinet he may plead that he has no assets, and that the land is of less value than the rent, and pray judgment whether he shall be charged otherwise than in the detinet only; Billinghurst v. Speerman(d); Buckley v. Pirk(e). Having no assets, then, the defendant is only liable for the profit which the premises actually yielded; 1 Wms. Saund. 111 a, n(c), 6th ed. In Hornidge v.

Horwood v. Whaley.

⁽a) 4 Tyrw. 111.

N. R. 593.

⁽b) 1 M. & Rob. 505.

⁽d) 1 Salk. 297.

⁽c) 3 M. & G. 297; S. C. 3 Scott,

⁽e) Ibid. 316.

Hopwood 8. Whaley.

Wilson (a), which was relied upon on the other side, there was an actual beneficial occupation, and that case is therefore inapplicable. On the other hand, Remnant v. Bremridge (b) is a decisive authority for the plaintiff. In that case it was held that an administrator was not liable to pay rent for premises demised to his testator, because they had not actually produced any profit. [Williams, J.—That was a hasty decision; for the defendant there was not sued as administrator, and yet the Court says, " if the defendant were not in possession, he could not be liable to discharge the rent de bonis propriis; for, he might have pleaded that the premises were of less value than the rent, and that he had no assets" (c). Surely that is not correct]. It is not necessary to rely on that authority, for here the issue raised by the pleadings was only whether the executor had actually derived any profit from the premises. It was not shewn that he had derived any; and if this was attributable to his neglect he may be made responsible for it in equity, where he is considered as a trustee; but not at law, where his liability upon a devastavit is limited to his misapplication of assets which have actually come to his hands.

COLTMAN, J. (d).—The case of Remnant v. Bremridge has not met with general approbation. In Hornidge v. Wilson(a), Patteson, J., remarked that it was unintelligible to him as reported. However, since Rubery v. Stevens (e), I take it to be clear law that an executor cannot discharge himself in toto, from personal liability as assignee without shewing that the premises are of no value, and that he has no assets; and it is difficult, therefore, to see how Remnant v. Bremridge can be sustained. The law, as there laid down, was utterly inapplicable to the facts of the case. In the present case the plea must be so construed as to make it a

⁽a) 11 A. & E. 645; S. C. 3 P.

⁽c) 8 Taunt. 196.

[&]amp; D. 641.

⁽d) Wilde, C. J., was absent from illness.

⁽b) 8 Taunt. 191; S. C. 2 Moore, 94.

⁽e) 4 B. & Ad. 241.

good plea if possible; and therefore, it must be understood to mean, not only that the defendant has not received any profit or advantage from the premises, but that he could not have derived any; otherwise the plea is no answer to the action. The replication, then, having put the whole plea in issue, the question is, whether the defendant had, or could have, received any profit or advantage from the premises to the extent of the rent, or any part thereof. The facts disproved the plea, because the jury found that the defendant might, by the exercise of reasonable diligence, have derived a profit to the extent of 60% a-year. The only difficulty in the case arises from the pleadings and the nature of the action. The action being in debt, and the issue on the only plea, which confesses the debt, being found against the defendant, it is contended that the plaintiff is entitled to recover the full amount laid in his declaration, that is, at the rate of the full rent of 901. a-year, and not at the rate of 601. a-year, the amount which the premises might have produced annually. On consideration, however, I think that the plea ought to be taken distributively, that is, that it must be understood as meaning that the defendant did not receive the whole rent reserved, or any part of it; and I think that the plaintiff is entitled to recover only that amount of profit which might have been derived from the The verdict will therefore be for 165L

MAULE, J.—I am of the same opinion. The law as to the liability of executors in these cases where the rent reserved exceeds the value of the premises, is involved in some difficulty and perplexity; but upon the result of the cases, as well as upon principle, I take the law to be, that if the rent be greater than the value of the premises, an executor is liable, as assignee, to the extent of the value of the premises; and if the value equal or exceed the rent reserved, then he is liable for the amount of the rent reserved. This plea, after verdict, is to be understood as meaning that the defendant had no special assets applicable

Hopwood

Whaley.

Horwood 6. Whaley.

to the payment of the rent; that is, that he derived no value from the premises. This is put in issue by the replication, and the question is, how, having regard to the facts found, the verdict is to be entered. The jury have said that the defendant might, by reasonable diligence, have derived a profit from the premises for two years and three quarters, at the rate of 60% a-year. The defendant entered upon the premises, and while he was in possession he might, it is obvious, have made 60L a-year by them, if he had pleased; and it is immaterial to consider whether he made the best use of the opportunity. Taking, then, these facts in connection with the plea, (as it must be understood to be a good plea), the result is that the defendant has had a profit and advantage to the extent of 165L. The only other question is as to the amount for which the verdict should be entered; for it is contended for the plaintiff that upon these pleadings he is entitled to the full amount of his demand claimed in the declaration. Looking merely to the abstract justice of the case, there is no doubt the defendant is only liable to the extent of 165L; but a difficulty arises from there being no plea of never indebted to the first count, but only this plea which is found against the defendant. I think, however, that we may read it distributively, that is, as alleging that as to each part of the plaintiff's demand the defendant has no assets to meet that part; then, to the extent of 165l., the plea has been disproved, and proved as to the residue.

WILLIAMS, J.—I have no doubt that it was my duty at the trial to construe the plea in the sense in which it would be construed after the verdict, to make it good, that is, that the premises were of no value. I have had great doubts whether the plea can be read distributively, but upon the whole I concur with the rest of the Court that we may so take it, and that the verdict should be reduced to 1654.

Rule absolute to reduce the verdict to 165L

1848.

NEWTON and Ux. v. Boodle and Others.

IN this action the defendants had judgment. In Michael- The Court mas Term, 1846, the plaintiffs obtained a rule nisi for a new trial, which was afterwards discharged with costs, to be paid by both plaintiffs. In Easter Term, 1847, a rule was the record obtained on behalf of Mrs. Newton, to rescind so much of the Chief Justhat order as directed the costs to be paid by her; but that tice to a of error. rule also was discharged with costs. An order, also, was made by Cressivell, J., at Chambers, which was subse- transcript be quently made a rule of Court, charging, under 1 & 2 Vict. that the proper c. 110, s. 14, a sum of stock held in trust for Mrs. Newton, course is to with the payment of the above mentioned costs. error was brought upon the judgment of this Court, which the Exchequer Chamber affirmed. A writ of error having afterwards been brought to the House of Lords, upon the judgment of the Exchequer Chamber;

amend the transcript of returned by tice to a writ omission in the complained of, A writ of nution in assigning errors.

The plaintiff, in person, now moved that the transcript might be amended, by inserting the rules above mentioned. [Wilde, C. J.—The writ of error is directed to me, and not to the Court; how can the Court interfere with my return to The return of the Chief Justice, it is submitted, is the return of the whole Court. In Bac. Abr. tit. "Error" (E.), it is laid down, that " if the Judges of the Common Pleas or other Judges, upon a writ of error, will not certify all the record, the party that sues the writ of error may allege diminution of the record, and pray a writ to the justices that certified the record before, to certify the whole record." [Maule, J.—Is it not, then, your proper course to allege diminution? The writ commands the Chief Justice to send "a transcript of the record and proceedings of the plaint aforesaid, with all things touching the same,"-words general enough to include the rules in question. Mellish v. NEWTON

BOODLE
and Others.

Richardson (a), and Gully v. The Bishop of Exeter (b), are authorities in support of this application. [Wilde, C. J.— In the latter case the rules formed no part of the return; the defendant set them out in the assignment of errors, and that course was disapproved of by Parke, B., who said, "It is the first time, and probably it will be the last, that any objection arising out of collateral matters has been taken on a writ of error" (c)]. In Mellish v. Richardson (a), it appears that the record was amended by the Court below, and the order of amendment was made part of the record as sent up to the Court of Error; and there is greater reason here, for making the present rules part of the record, as they have the effects of judgments; 1 & 2 Vict. c. 110, s. 18.

MAULE, J.—If you complain of the return of the Chief Justice, you should do so to the Court where the return is made. This Court cannot entertain the question.

WILDE, C. J.—Your motion is opposed to all precedent.

Rule refused.

Interlocutory rules for the payment of costs do not form part of the record, notwithstanding the 18th section of 1 & 2 Vict. c. 110, which gives them the effect of judgments.

On a later day in this Term, the plaintiff, in person, moved for a rule nisi calling on the defendants to shew cause why the plaintiffs should not be at liberty to enter the above mentioned rules on the judgment roll, and to make a corresponding amendment in the transcript. He again referred to *Mellish* v. *Richardson*, and to the operation of the 18th section of the 1 & 2 Vict. c. 110, in giving orders and rules of Court the effect of judgments, citing *Tolson* v. *Dykes* (d), where it was held by *Lyndhurst*, L. C., that a

⁽a) 9 Bing. 125; S. C. 2 M. & 457. Scott, 191. (c) 10 B. C. 614.

⁽b) 10 B. & C. 584; 5 M. & R. (d) 1 Phil. 439.

person who had lain in prison for twelve months under an attachment for disobedience to an order of the Court of Chancery, ordering him to pay certain costs amounting to less than 20L, was entitled to be discharged under the 48 Geo. 3, c. 123, on the ground that by the 18th section of the 1 & 2 Vict. c. 110, an order of a Court of equity for the payment of costs had the effect of a judgment. [Maule, J.—A writ of error lies only upon a judgment; but the statute does not make rules and orders, judgments; it only gives them "the effect of judgments." If your argument be valid, it would follow that all decrees and orders of Courts of equity, and all orders in bankruptcy and lunacy, for the payment of money are judgments, and are removable by writ of error]. He referred also to Tod v. Tod (a).

NEWTON v.
BOODLE and Others.

COLTMAN, J. (b).—There is no ground for granting this In Mellish v. Richardson the question was much considered; and Tindal, C. J., in delivering the opinion of the Judges, after stating that the pleadings, the continuance of the suit and process, the finding of the jury upon any issue of fact, and the judgment of the Court below, form the record, adds, "but the orders or rules for amendments of proceedings, made by a Court in the progress of a suit therein depending, do not fall within the description of any part of the record." "And we cannot but observe that no precedent has been cited at the Bar in which an entry similar to that contended for by the plaintiff in error, is to be found. So strictly has the law considered that the pleadings in the suit, and the judgment proceeding thereon, shall form the only grounds of the record; that when it was found expedient that the opinion, in point of law, of the Judge who tried the cause should be made the subject of revision by a superior Court, the Statute of Westminster the second (13 Edw. 1,)

⁽a) 1 Bligh. N. S. 639.

⁽b) Wilde, C. J., was absent from illness.

NEWTON v.
BOODLE and Others.

expressly gave authority for that purpose, by a bill of exceptions." I am, therefore, of opinion that interlocutory rules form no part of the record. And it does not appear to me that the statute of Victoria has made any alteration in this respect; for although it gives these rules and orders the force of judgments, it does not make them part of the record. No case has been cited which supports this motion, and *Mellish* v. *Richardson* (a) is against it. I, therefore, think there is no ground for this application.

MAULE, J.—I am of the same opinion. According to the established practice, these orders form no part of the record; they are made upon grounds which do not appear upon the record; and therefore they are not fit subjects for a writ of error. The statute of Victoria, indeed, gives these orders the effect of judgments, but that is only for the purpose, it seems to me, of adding to the already existing remedy by attachment, the more effectual remedy of an execution against the property of the debtor. If it had been intended that the statute should introduce so great an alteration in the law as to give a writ of error upon all these orders, the intention would certainly have been expressed in distinct terms, and would not have been left to be collected by inference.

WILLIAMS, J.—I am of the same opinion. It is quite clear that these rules formed no part of the record before the statute of Victoria, and that that statute has not made any change in this respect

Rule refused.

(a) 9 Bing. 125.

1848.

HAYTER and Another v. FISH.

BYLES, Serjt., on a former day, obtained a rule calling A defendant on the plaintiffs to shew cause why they should not carry in the record; and why the defendant should not be at liberty to enter a suggestion to deprive the plaintiffs of their costs, plaintiff of under the 129th section of the County Courts' Act (9 & 10 Vict. c. 95); and why the plaintiffs should not pay the costs of the application. The defendant's affidavit, upon which making out a the motion was made, stated that the plaintiffs carried on case, which is business at 52, Mark Lane, in the city of London; that the plaintiff. this action was commenced in July, 1848, for the recovery of 8L 15s. for goods sold and delivered, and that at the for entering a trial before the Secondary of the city of London, in the Court will not month of August, the plaintiffs obtained a verdict for that amount; that before and at the time that the action was commenced, the defendant dwelt and carried on his business at Prince's Row, Pimlico, in the county of Middlesex, and that all the goods were delivered to the defendant at his said residence in Prince's Row, Pimlico; that at the time when this action was commenced, the plaintiffs did not, nor did either of them, dwell more than twenty miles from the defendant, but, on the contrary, both the plaintiffs then and still dwelt within twenty miles from the defendant; that the cause of action arose in a material point within the jurisdiction of the Court within which the defendant dwelt and carried on his business at the time this action was commenced; that the place where the defendant dwelt before and at the time when this action was commenced, and where he still dwelt, and where the said goods were delivered, was, at the time when this action was commenced, and still was within the jurisdiction of the County Court of Middlesex; that that Court was then open and established; that a plaint might have been entered in the said Court for the said sum of 81. 15s. before and at the

enter a suggestion to deprive the costs under the 9 & 10 Vict. c. 95, s. 129, upon primà facie not denied by

Upon making absolute a rule suggestion, the give costs, as the suggestion may be traversed.

HAYTER and Another v.

time when this action was commenced, and that the defendant might have been summoned to the said Court for the said sum; that neither of the plaintiffs nor the defendant were, when the action was commenced, or ever had been, an officer of the said, or of any other County Court, nor was any officer of the said County Court in any way a party to the action; and that the Judge who tried the cause did not certify that the action was fit to be brought in a superior Court.

Simon now shewed cause. The affidavit is insufficient to entitle the defendant to enter a suggestion; it does not distinctly shew that the plaintiffs and the defendant dwelt within twenty miles of each other; it does not even state where the plaintiffs dwelt. The affidavit also fails to point out which of the eleven district County Courts of Middlesex had jurisdiction in this case. Further, the affidavit does not specify in what material point the cause of action arose within the jurisdiction of the County Court.

Byles, Serjt., in support of the rule. The affidavits which are made in support of these applications, are not to be construed with the strictness which would be applied to pleadings. It is sufficient if they make out a primâ facie case; Butler v. Corney (a). The affidavit in this case follows the words of the act with respect to the distance between the plaintiffs' and defendant's places of abode; and as to the omission to mention the particular district County Court, the act of Parliament makes no mention of them whatever, but speaks only of County Courts. [He was then stopped by the Court.]

COLTMAN, J.—Butler v. Corney establishes that it is only necessary for the defendant to make out a primâ facie case to entitle himself to enter the suggestion, and in this

case we think that enough has been stated to justify the motion.

1848. HAYTER and Another FIBH.

Byles, Serjt., asked that the rule might be made absolute, with costs.

PER CURIAM.—As it is open to the plaintiffs to traverse the suggestion, the costs of the application cannot be given now, but must abide the result of the traverse

Rule absolute accordingly (a).

(a) See Peterson and Another v. Davis, ante, p. 79.

KEARNS v. DURELL.

DEBT by the payee against the maker of a promissory The defendant note for 20L payable on demand.

Second plea; that before and at the time of the making promissory of the said promissory note, the plaintiff was illegally possessed of certain goods and chattels of the defendants, and wrongfully and illegally detained the same from the defendant without any right or title so to do, and refused to give up the same to the defendant, although often requested so to do, unless he, the defendant, would make his promissory note in writing, and would thereby promise to pay to the plaintiff the sum of 201 on demand, and deliver the said promissory note to the plaintiff; whereupon the defendant, in order to

pleaded to an action on a note, that the plaintiff wrong-fully detained his goods, and refused to give them up, unless be gave tho plaintiff a promissory note; that he accordingly note sued upon, and delivered it to the plaintiff, to

obtain possession of his goods; and that except as aforesaid there was no consideration, &c.:

Held, on special demurrer, that the plea was bad, and was no answer to the action.

Semble, the plea would have been good; if it had averred the circumstances under which the plaintiff obtained possession of the goods, or averred that the plaintiff knew he had no right to

the goods.

To an action by payee against maker of a promissory note, payable on demand, a plea that the note was made and delivered on account of a balance claimed by the plaintiff, and upon an agreement that the plaintiff should not enforce payment unless a balance was really due, with an averment that no balance was due, is a good plea, without alleging the agreement to be

(a) Sec Adams v. Wordley, 1 M. & W. 374, and Capner v. Mincher, ante, vol. 2, p. 694.

KEARNS

DURELL.

regain possession of his said goods and chattels, did, to wit, on, &c., make the said promissory note in manner and form, &c., and delivered the same to the plaintiff for the purpose aforesaid, and for no other purpose, and on no other account whatsoever. And the defendant avers that, except as hereinbefore mentioned, there never was any value or consideration whatever for the making of the said note, and the plaintiff now holds, and always held, the said promissory note without any value or consideration whatever. Verification.

Third plea, that before the making of the said promissory note there had been, and were, certain accounts between the plaintiff and the defendant, and the plaintiff, at the time of the making of the said note, alleged that there was then a balance due from him on such accounts, which was unpaid and unsettled. And the defendant further says, that thereupon he, the defendant, to wit, on, &c., at the request of the plaintiff, and on the faith of such allegation of the plaintiff, made and delivered to the plaintiff the said promissory note for and on account of the alleged balance stated by the plaintiff to be then, at the time of the making and delivery of the said note, due on the said accounts from the said defendant to the said plaintiff, and that the said note was made and delivered as aforesaid, on the condition that the plaintiff should not demand payment of the said note, unless it should appear that such balance was due. And the defendant, in fact, says, that at the time of the making of the said note, there was not any balance or sum of money whatever due from the defendant to the plaintiff on the said accounts, or unsettled claims, as alleged by the said plaintiff, nor was the defendant then indebted to the plaintiff in any sum of money whatever, as the balance of, or on, such accounts, or in respect thereof. And so the defendant says, that, except as aforesaid, there never was any value or consideration whatever for the making of the said note, and the plaintiff now holds and always held the same without any value or consideration whatever. Verification.

Special demurrers to both pleas, and joinders.

Couch, in support of the demurrers. The second plea is bad for ambiguity; for it is uncertain whether the defence set up by it be duress of goods, or want of consideration. If both be relied upon, the plea is bad for duplicity; for, although the want of consideration is badly pleaded—the circumstances which occasioned the want of consideration not being stated—a plea is not the less double, because one of the grounds of defence is badly pleaded; Stephens v. Underwood(a). But the want of consideration is not here averred absolutely, but is so connected with the first part of the plea that a traverse of it would be immaterial, and it would in effect be put in issue by a traverse of the duress; Atkinson v. Davies (b). [Maule, J.—The want of consideration is stated as a deduction from the facts stated in the former part of the plea. The words are, "except as hereinbefore mentioned, there never was any value." Then the defendant must rely upon the duress of goods; but that is no answer to the action; Sheate v. Beale(c). The only duress which avoids a contract, is duress of the person; per Parke, B., in Atlee v. Backhouse (d). "There is no doubt," says that learned Judge, "of the proposition laid down by Mr. Erle, that if goods are wrongfully taken, and a sum of money is paid, simply for the purpose of obtaining possession of those goods again, without any agreement at all, especially if it be paid under protest, that money can be recovered back; not on the ground of duress, because I think that the law is clear, although there is some case in Viner's Abridgment to the contrary(e), that, in order to avoid a contract by reason of duress, it must be duress of a man's person, not of his goods; and it is so laid down in Sheppard's Touchstone (f):—but the ground is, that it is not a voluntary payment. If my goods have been wrongfully detained, and I pay money simply to obtain

KEARNS

O.

DURELL

⁽a) 4 Bing. N. C. 655; S. C. Scott. 402. non. Stevenson v.

⁶ Scott, 402, nom. Stevenson v. Underwood, 6 Dowl. 737.

⁽b) 11 M. & W. 236; S. C.

² Dowl. 778, N. S.

⁽c) 11 A. & E. 983; S. C. 3 P.

[&]amp; D. 597.

⁽d) 3 M. & W. 633, 650.

⁽e) Citing Vin. Abr. Duress.

B. 3; 1 Roll. Abr. 687.

⁽f) Citing p. 61.

KEARNS

DUBELL.

them again, that being paid under a species of duress or constraint, may be recovered back; but if, while my goods are in possession of another person, I make a binding agreement to pay a certain sum of money, and to receive them back, that cannot be avoided on the ground of duress."

[Maule, J.—No doubt, if the agreement be a binding agreement.] In Parker v. The Great Western Railway Company (a), money paid under protest was recovered back; but here the note was given without any protest, and if it had been money and not a note, it may be questioned whether it could have been recovered back in an action for money had and received.

The third plea is also bad. It states, that the note was obtained by a fraudulent misrepresentation; and, further, that though on its face payable on demand, it was, in fact, payable only on a condition. Each of these allegations is an answer to the action, and the plea is therefore double. [Maule, J.—The fraudulent representation is not said to have been made knowingly, therefore the defence of fraud is not raised.] Then the plea merely sets up an agreement between the parties that a note, payable on demand, should not be payable, except upon a condition. This agreement, however, is not stated to be in writing; and unless it be in writing, it is inoperative; for the terms of a written instrument cannot be varied by parol. It is not the Statute of Frauds, but the common law, which requires such an agreement to be in writing; and therefore the plea is bad, for not stating it to have been in writing.

Peacoch, contrà. The second plea is a special plea, that there was no consideration; and Atkinson v. Davies (b) is an authority in favour of such a plea. The duress is not relied upon further than as shewing that there was no consideration for the note; and it is therefore unnecessary to controvert the doctrine laid down in the passage cited on

⁽a) 7 M. & G. 253; S. C. 7 Scott, N. R. 835.

⁽b) 11 M. & W. 236.

the other side, from the judgment of Parke, B., in Atlee v. Backhouse(a). In Astley v. Reynolds(b), indeed, it was decided, that money had and received would lie to recover a sum paid under duress of goods. But the only question here is, does not the plea sufficiently disclose the want of consideration? If the plaintiff claimed any right to the goods, he should have replied it, as the circumstances giving him title must be peculiarly within his own knowledge; Lindon v. Hooper(c).

The third plea, also, like the second, is in substance a plea that there was no consideration for the note. It shews that the note was given for the balance of an account, and that, in fact, there was no balance, and, consequently, no consideration. The objection that the plea states an agreement to vary the note, and does not state that agreement to have been in writing, is unfounded; the plea in substance states, that when the note was delivered to the plaintiff, it was delivered upon the condition, that he should enforce it only in a certain event. If the plaintiff were to recover on the note, the defendant would recover back the amount by an action on the agreement. If the plea be good, circuity of action is avoided, and this, it is submitted, is a test of the goodness of the plea.

Couch, in reply. The second plea does not shew that the goods were given up to the defendant without any consideration. It was not, indeed, necessary to negative every imaginable circumstance which would have been consistent with the existence of a valid consideration; it would have been sufficient to have set forth the circumstances under which the plaintiff did in fact possess himself of the goods; for the Court, being thus enabled to decide whether the plaintiff's possession was legal or not, would at the same time have been in a position to see whether there was any

KEARNS

O.

DURELL.

⁽a) 3 M. & W. 650.

⁽b) 2 Stra. 915.

⁽c) Cowp. 414.

KEARMS

DURKLL.

consideration for the note. But, further, the delivering up of the goods without compelling the defendant to resort to an action for their recovery, is a good consideration. In Haigh v. Brooks (a) it was held, that the giving up a void guarantee upon request, was a sufficient consideration to support a promise. [Williams, J.—It was doubtful whether that guarantee was good or bad.] At all events, it is consistent with the plea that the right to the possession of the goods was in question, and that the note was given to avoid all dispute, which would have been a good consideration; Gulliver v. Cosens (b).

The objection to the third plea has not been met. In Rawson v. Walker (c) it was held, that the maker of a promissory note payable on demand, could not give parol evidence of an agreement that the note should be payable on a contingency only. [Coltman, J.—But it does not follow from that case that such an agreement should be stated, in pleading, to have been in writing.]

COLTMAN, J.—We are all of opinion that the third plea is good. It states in substance a good defence to the action, viz., that there was no consideration for the note; and it was not necessary to aver that the agreement not to enforce the note, if nothing was due on the balance of the account, was in writing. The second plea may be open to some doubt. If it had alleged that the plaintiff knew he had no right or pretence for detaining the goods, I should have thought the plea good; but in the absence of all allegation of the circumstances under which the right to detain was claimed by the plaintiff, I think the plea is bad.

MAULE, J.—It is alleged in the third plea, that the note was made and delivered on condition that the defendant should not be called upon to pay it, if no balance was due.

⁽a) 10 A. & E. 309; S. C. 2 P. (b) 1 C. B. 788. & D. 477; In Error, 4 P. & D. 288. (c) 1 Stark. 361.

That allegation does not contradict the terms of the promissory note. I agree that the second plea is bad.

1848. KEARNS DURELL.

WILLIAMS, J.—I also think that the third is a good plea. It states that there was no consideration for the note, and it shews that by setting out the circumstances under which it was given. I have great difficulty as to the second plea. I do not know any authority for the proposition that the delivery up of goods by a person who has no right to the possession of them, is a good consideration for a promissory note. But I am not prepared to say that a state of things might not exist in which it might be a good consideration; and if such a state of circumstances can arise, the second plea is insufficient.

> Judgment for the Plaintiff on the second plea, for the Defendant on the third.

SMITH v. MARSACK.

ASSUMPSIT on two bills of exchange.

The first count stated that on, &c., Owen Smith made To a count his bill of exchange, and directed the same to a person by indorsee described in the bill as Mrs. Warner, and thereby required against indorser, defendher to pay to his order 101, three months after date; that ant pleaded O. S. indorsed to the defendant, who indorsed to the indorsee, and plaintiff, &c.

plaintiff were the same per-son, and that plaintiff would

Replication, that be liable upon the bill to the defendant, in the event of the latter paying it. the plaintiff indorsed to defendant, in order that the latter might re-indorse it to him as surety for the acceptor, and that there was no consideration for the plaintiff's indorsement to defendant.

Held, that the replication was an answer to the plea, and no departure.

To a count upon a bill by indorsee against acceptor, a plea that the drawer was a married woman at the time of the indorsement, and that her husband did not authorize or consent to her indorsement, was held bad, on the ground that the defendant was not at liberty to deny the maker's power to indorse, after having, by his acceptance of the bill, asserted that she had the power in question.

SMITH
D.
MARSACK.

The second count stated that one Caroline Warner made her bill of exchange, directed to defendant, and thereby required defendant to pay to her order 10*l* two months after date; that defendant accepted the bill, and C. W. indorsed it to plaintiff.

Plea to the first count, that the said O. S., the maker and indorser of the bill, is the plaintiff, and no other person; and that the plaintiff, and no other person, is the maker, payee and indorser of the said bill, and is liable to the defendant as such indorser in the event of the payment of the same by the defendant. Verification.

Plea to the second count, that the said C. Warner, before and at the time of the said indorsement by her, was and is still the wife of one Edward Warner, and that the said husband of the said C. Warner, before and at the time of the said indorsement by the said C. Warner, was and still is living, and has not at any time authorized or consented to the said indorsement of the said bill by his said wife. Verification.

Replication to the plea to the first count, that the defendant indorsed the said bill to the plaintiff for the accommodation of the said Mrs. Warner, and in order to secure a guarantee to the plaintiff for a certain debt of 10L, then, and at the time of the said indorsement, due from the said Mrs. Warner to the plaintiff, and with intent thereby of becoming surety, as such indorser, for the payment of the said debt by the said Mrs. Warner, to the plaintiff, and which debt is still due by the said Mrs. Warner to the plaintiff; and that there never was any consideration or value for the said indorsement by the plaintiff to the defendant, but the said bill was indorsed by the plaintiff to the defendant in order that the same might be indorsed by the defendant to the plaintiff for the purpose of the defendant hereby becoming surety, as such indorser, for the payment of the said debt due from the said Mrs. Warner to the plaintiff aforesaid, and for no other purpose whatever. Verification.

Replication to the plea to the second count, that the

defendant ought not to be permitted to plead the said plea by him above pleaded to the said second count, or to say that the said C. Warner, before and at the time of the indorsement, was the wife of the said E. Warner, and that the said E. Warner had not authorized or consented to the said indorsement, or that the said C. Warner had no power to indorse the said bill, and to transfer to the plaintiff the property therein, because the plaintiff says that the said C. Warner was a married woman, and the wife of the said E. Warner, before and at the time when she made the said bill, and before and at the time of the acceptance of the said bill by the defendant, as well as at the time of the said indorsement to the plaintiff, as he, the defendant, before and at the said several times of the making and accepting and indorsing of the said bill respectively, had full notice. Averment, that he, the plaintiff, had not either before or at the said several times of the making and accepting and indorsing of the said bill respectively, or either of them, or at any time before the commencement of this suit, any notice, nor did he, the plaintiff, at any time before the commencement of this suit, know that the said C. Warner was a married woman, and the wife of the said E. Warner, or that she had not power or authority to indorse the said bill, and to transfer to the plaintiff the property therein; that the plaintiff, at the time of the said indorsement, gave full value to the said C. Warner for the said indorsement, and the plaintiff gave such value, and took the said bill, and became the indorser thereof, upon the faith and credit of the defendant's acceptance of the said bill, and of the said C. Warner having power, and being a person competent, qualified, and able to indorse the said bill to the plaintiff, and to transfer to the plaintiff the property in the same. Verification.

Special demurrers, to both replications, and joinders.

Aspinall, in support of the demurrers. First, the replication to the first plea is no answer. It admits the plaintiff's

SMITH b.
MARSACE.

SMITH U. MARSACK

indorsement, and consequently his liability to the defendant; and the circumstances under which that indorsement and the indorsement by the defendant to the plaintiff are stated in the replication to have been made, do not take the case out of the general rule, (for preventing circuity of action), that the indorser of a bill cannot, upon its being re-indorsed to him by his indorsee, sue the latter upon the bill. replication is also a departure from the declaration. Wilders v. Stevens (a) this objection was made to a similar replication, but the Court expressed no opinion upon it. because it had not been pointed out as a cause of special demurrer. But that has been done in this case; and it is submitted that the replication does not support the declaration, but sets up facts inconsistent with it. The declaration states that the plaintiff indorsed to the defendant, meaning, not merely that he wrote his name on the bill, but that he transferred the property in the bill; Marston v. Allen (b); Adams v. Jones (c); but the replication alleges facts, from which it follows that the property did not pass by the indorsement. This, therefore, constitutes a departure.

As regards the replication to the second plea, it is submitted, that the replication is bad, and that the plea is good. [The argument on these two points is omitted, as the Court gave no decision on the first, and their judgment enters fully on the second].

Needham, contrà. First, the plea to the first count is bad. It merely alleges that the plaintiff indorsed the bill before the defendant indorsed it to him. It should have stated all the facts which give rise to the alleged circuity of action. [Cresswell, J.—It shews a primâ facie case of circuity of action]. At any rate, the replication is good. Wilders v. Stevens (a) is a decisive authority that it is good in substance; and there is no departure, for both in the declara-

⁽a) 15 M. & W. 208. (b) 8 M. & W. 494; S. C. 1 & D. 174. Dowl. 442, N. S.

tion and in the replication the plaintiff claims in the same character, viz., as indorsee for value. Prince v. Brunatte(a) was a much stronger case; there, to a declaration upon a bill by indorsee against acceptor, the defendant having pleaded that the drawer was a married woman, it was held to be no departure to reply that she had drawn the bill with the authority of her husband.

SMITH
U.
MARSACK.

PER CURIAM.—We think the replication to the first plea is no departure. The declaration shews a title in the plaintiff to sue; the plea states that he cannot sue, because he would be liable to be sued by the defendant if he recovered in this action; and the replication alleges facts which only shew that the plaintiff would not be liable to be sued. As to the demurrer to the replication to the second plea,

Cur. adv. vult.

WILDE, C. J., now delivered the judgment of the Court. -The declaration in this case contained two counts on two bills of exchange. There was a special plea to each of these counts respectively, and a replication, to which the defendant demurred specially; and these demurrers came on to be argued before Maule, J., Cresswell, J., Williams, J. and myself. As to the first count, the Court expressed their opinion, and the grounds of it, in the course of the argument; but with respect to the second count, the Court took time to consider their judgment. The second count is on a bill drawn by one C. Warner, payable to her order, accepted by the defendant, and indorsed by C. Warner to the plaintiff. The plea is, that C. Warner, before and at the time of the indorsement, was and still is the wife of one Edward Warner, and that he never authorized or consented to the indorsement by her. To this plea the plaintiff has replied by way of estoppel. Several objections to this

⁽a) 1 Bing. N. C. 435; S. C. 1 Scott, 342; 3 Dowl. 382.

SMITH
D.
MARSACK.

replication are specially assigned for causes of demurrer, and were argued before us; but it is unnecessary to give any opinion as to their validity, because the Court is of opinion that the plea is not a good bar. It does not allege any alteration in the status of C. Warner between the time of the drawing, and that of her indorsing, the bill. question, therefore, is, whether in an action by the indorsee against the acceptor of a bill of exchange made payable to the order of the drawer, it is an answer, that the drawer had no capacity to indorse, by reason of her having been a married woman at the time of her drawing, and her having continued so till the time of her indorsing, the bill. we are of opinion that it is not, both upon the authority of the cases of Drayton v. Dale (a), and Pitt v. Chappelow (b), cited by Chief Justice Tindal, in Sanderson v. Collman(c), and Braithwaite v. Gardiner(d), and upon principle: for that, as the defendant, by his acceptance, undertook to pay to the order of C. Warner, he cannot, when sued as such acceptor, defend himself by alleging, as a ground of defence, her incapacity, existing at the time of his acceptance, to make an order. In support of a contrary doctrine, the cases of Connor v. Martin (e), Barlow v. Bishop (f), and Prince v. Brunatte (g), were cited on the argument by the counsel for the defendant. In Connor v. Martin, as reported in Strange, the plaintiff declared on a note made to a feme covert, and indorsed by her to him; and, on argument, judgment was given for the defendant, the right being in point of law vested in her husband, and the wife having no power to dispose of it. But this case was cited by Dennison, J., in 3 Wilson, 5, from a note of it taken by himself in Court; and it appears from that learned Judge's statement, that the promissory note in question had been given to the wife before marriage. Barlow v. Bishop is certainly a direct authority for the proposition,

(a) 2 B. & C. 293.

(e) 1 Stra. 516.

(b) 8 M. & W. 616.

(f) 1 East, 432.

(c) 4 M. & G. 209. 218, 19.

(g) 1 Bing. N. C. 435.

(d) 8 Q. B. 473.

1848.

Витн

MARSACK.

that, if a note is drawn payable to a woman or order, and her indorsee sues the maker, he may set up as a defence that she was a married woman, though he knew her to be such at the time he made the note. But, it was observed by Lord Abinger, in Pitt v. Chappelow, that in that case the plaintiff must be taken to have known the fact of the husband's property in the bill, and therefore could not take an assignment of it from the wife. Indeed, it appears from the report of the case at Nisi Prius, in 'Espinasse (a), that the wife had given a previous note for the money, in her own name, and that the note in question was given by the defendant in consequence of such former note not being negotiable; which appears to favour Lord Abinger's supposition that the plaintiff must have known of her coverture before the note was indorsed to him. In Prince v. Brunatte it was certainly assumed by the Court, as well as by the counsel on both sides, that such a plea as the present would be a good answer to the action; and the same observation arises with respect to the case of Cotes v. Davis (b), and that of Prestwick v. Marshall (c). But in none of these cases does it appear that the point now under consideration was ever made, viz., that the case falls within the general principle (which is stated by Bayley, J., in his judgment in Drayton v. Dale (d), as "applicable to all negotiable securities,") "that a person shall not dispute the power of another to indorse" "an instrument, when he asserts by the instrument" "that the other has such power;" and we can discover no reason why this principle is not applicable; and if it is, it appears to us to govern the present case, and to prove that the plea in question is bad. It need scarcely be added, that in so deciding, we do not mean at all to impugn the proposition, that if a bill or note is made payable to the order of a married woman, the property in it will pass by the indorsement of the husband, or he may sue on it, either joining his wife as a party to the action, or in his own name,

⁽a) Vol. 3, p. 266.

⁽c) 7 Bing. 565.

⁽b) 1 Campb. 485.

⁽d) 2 B. & C. 293, 299.

SMITH

S.

MARSACK

at his option. And, consequently, it cannot be denied that the defendant may, possibly, be compelled to pay the bill in question twice; but this is a consequence which follows his own act of accrediting the capacity of a married woman to indorse, (by accepting a bill payable to her order,) who in truth was incapable. On these grounds we think that the plaintiff is entitled to our judgment on the second, as well as on the first count.

Judgment for the Plaintiff.

BELCHER and Others, Assignees of Brown, a Bankrupt, v. PATTEN.

Upon a feigned issue directed at the instance of the sheriff, between the assignees of a bankrupt and an execution creditor, the assignees must rely on their own title, and are not entitled to set up the jus tertii.

Upon such an issue it is not competent to the assigness to deny that the goods were seized by the sheriff by wirtue of the defendant's writ.

FEIGNED issue under the Interpleader Act to try whether the plaintiffs, as assignees of Charles Brown, were entitled to certain goods as against the defendant, an execution creditor.

Upon the trial before Williams, J., at the sittings in London after Easter Term, 1847, the following facts were On the 27th of February, 1847, the goods in the bankrupt's residence, in Somerset Street, Aldgate, were seized under a fieri facias, upon a judgment recovered against him by one Leschalles, in the Lord Mayor's Court, in an adverse action. On the 3rd of March following, a writ of fieri facias upon a judgment recovered against the bankrupt by the defendant in this Court, in an adverse action, was lodged with the sheriffs of London. On the 4th of March. the landlord of the house distrained for rent in arrear, and at a later hour of that day, the sheriffs seized under the fieri facias of the defendant. On the same day, the bankrupt executed an assignment of his estate and effects for the benefit of his creditors; upon which act of bankruptcy a fiat was issued on the 9th of March. The defendant had not, at the time of the seizure under his writ, any notice of the act of bankruptcy. On the 6th of April, the landlord

sold the goods, and after satisfying his own claim and Leschalles's debt, paid the surplus into Court to abide the event of the issue. Upon these facts the jury, by the direction of the learned Judge, found a verdict for the plaintiffs, and leave was reserved to the defendant to move to have it entered for him.

BRICHER and Others v.
Patter.

Talfourd, Serjt., on a subsequent day, accordingly obtained a rule nisi for this purpose, and

Byles, Serjt., and Couch now shewed cause. The bankrupt had not, when the sheriffs entered under the defendant's fieri facias, such an interest in the goods as could be seized; for the goods were then already out of his possession, and in custodiâ legis, under the first execution, and also under the distress. The 108th section of the 6 Geo. 4. c. 16, enacts, that no creditor of a bankrupt, with security for his debt, shall receive more than a rateable part of his debt, "except in respect of any execution or extent served and levied, by seizure upon," "any part of the property of such bankrupt before the bankruptcy." This section requires actual seizure. "We think," says Tindal, C. J., in Johnson v. Evans (a), "the statute meant by the words 'execution served and levied by seizure upon the goods,' a substantial seizure for the purpose of satisfying the execution by actual sale." But such a seizure was in this case impossible, for "the sheriff cannot take goods in pledge, or demised to another, nor goods taken, and in the custody of the sheriff upon a former execution;" Com. Dig. tit. "Execution" (C. 4). And in Bachurst v. Clinkard (b), it was held by Holt, C. J., that goods "being once seized and in the custody of the law could not be seized again by the same or another sheriff, and if they were sold thereon, such bargain would be void." So in Reddell v. Stowey (c), it was held that an

⁽a) 7 M. & G. 240, 251; S. C. (b) 1 Show. 173. 7 Scott, N. R. 1035; ante, vol. 1, (c) 2 M. & Rob. 358. p. 935.

BELCHER and Others v. PATTEN.

action for rescue of goods and pound breach lay against a bailiff, who being in possession of goods under a landlord's distress, received a fieri facias from the sheriff, and sold the goods under it. So it has been decided that property, held by a party in respect of a lien only, cannot be taken in execution; Legg v. Evans (a). [Maule, J.—Because, there, the sheriff could not have sold the interest of the debtor. But could not the sheriff in this case have sold Brown's interest in the goods, subject to the distress and the first execution?] The general rule is, that the sheriff can only seize such things as he can sell, but it does not follow that he can seize everything which he can sell. For instance, a debt or other chose in action may be sold, but it cannot be seized; therefore, assuming that he might have sold the bankrupt's interest, it does not follow that that interest might have been seized. The surplus which might remain, after satisfying the landlord and the first execution, was in the nature of a debt, and not seizable either before or since the 1 & 2 Vict. c. 110, s. 12; Harrison v. Paynter (b). [Wilbraham v. Snow (c), and note (c) to that case, and Tidd's Pract. 1003, 7th ed., were referred to.]

Talfourd, Serjt., and Bevan, in support of the rule. The assignees are precluded by the terms of the issue from denying that the goods were seized; for the question raised by it is, whether the goods, as claimed by them "and seized by the sheriffs," were their goods or not. If the sheriff had not seized, he would not have been entitled to call upon the plaintiffs and defendant to interplead; Scott v. Lewis (d). But, independently of this objection, the word "seizure," in the 108th section of the Bankrupt Act, must receive a reasonable construction; and it is submitted that there was an actual seizure under the defendant's fieri facias within the

⁽a) 6 M. & W. 36; S. C. 8 (c) 2 Wms. Saund. 47 a, and Dowl. 177. 47 b, n. (c), 6th ed.

⁽b) 6 M. & W. 387; S. C. 8 (d) 4 Dowl. 259; S. C. 2 C., Dowl. 349. (d) & R. 289.

meaning of that section. When the sheriff seizes goods, and there are at the time of the seizure many writs in his hands, he seizes the goods, not merely under the first writ, but under all the writs, which he satisfies according to their priorities. So it has been held that goods in the hands of the sheriff, under a fieri facias, are, upon a second writ being delivered to him, bound by the second writ from the time of such delivery; Jones v. Atherton(a); Saunders v. Bridges (b). A second seizure under such circumstances would be idle and unnecessary. [Maule, J.—No doubt; because both writs are delivered to the same sheriff. But suppose the writs are delivered to different sheriffs, and one of them enters and seizes everything, what is there left for the other to seize?] In such a case only so much of these goods would be bound by the first seizure as was necessary to satisfy the first writ, and the second seizure would bind the residue. In Graham v. Witherby (c), the sheriff seized under a fieri facias, upon a judgment entered up on a warrant of attorney, and a fieri facias was afterwards lodged with him in a bonâ fide adverse action against the same debtor, upon which the sheriff delivered a warrant to the officer already in possession; and the Court, having decided that the first writ was void, held that the second writ had in the first instance attached on the goods provisionally, and now became in effect the The seizures under Leschalles's writ and under the landlord's distress bound the goods to the extent of the claims of those persons, but the goods were nevertheless seizable under the defendant's writ. If, however, they were in custodia legis, how were the assignees entitled to them? For, if they were protected from the defendant's execution, they were equally so from the plaintiffs' title. The older authorities, however, as to goods being in the custody of the law, must be received with much qualification. The best explanation of the expression is in 1 Wms. Saund. 219 g, n. (t), 6th ed., where after stating that the property of the

BELCHER and Others t. PATTEN.

⁽a) 7 Taunt. 56.

⁽c) 7 Q. B. 491.

⁽b) 3 B. & A. 95.

BEIGHER and Others

PATTEN.

goods is bound under the stat. 29 Car. 2, from the delivery of the writ to the sheriff for execution, the writer adds, "The meaning of the expression, that the property of the goods is bound is, not that the property in them is altered, for such alteration does not, nor ever did, take place until actual sale of the goods under the writ; but that the defendant, from the time that they are bound, cannot dispose of them, unless in market overt, so as to prevent their being taken in execution." Hutchinson v. Johnston (a); Giles v. Grover (b); 1 Rol. Abr. tit. "Execution," (B.), pl. 1, Williams, J.—A seizure de facto is were referred to. admitted by the assignees on this issue. If they denied that the sheriff had been in possession, they should have said so to the Judge at Chambers before he ordered an issue. Maule, J.—We must take it that a seizure in facto is admitted?

COLTMAN, J. (c).—I think this rule must be made absolute. It is quite clear that the original property in the goods was vested in Brown; and that property was not altered by the circumstances which occurred prior to the sheriff's entry and seizure under the writ of the defendant. The goods were then still liable to be taken under any execution against Brown. If, indeed, the first execution creditor or the landlord had interfered, and had thought proper to prevent a seizure, that would have been a different matter; but neither Brown nor his assignees are identified in interest with those persons, and therefore this is, in fact, an attempt by the assignees to set up the title of a stranger, which I am of opinion they have no right to do.

Maule, J.—I am of the same opinion. In this case, it appears that the goods of one Brown, which were already taken in execution, were seized by the sheriffs of London

⁽a) 1 T. R. 729. (c) Wilde, C. J., was absent (b) 9 Bing. 128; S. C. 2 M. from illness. & Scott, 197.

under a fieri facias, issued at the suit of the defendant. The assignees of Brown afterwards claim the goods; and the question raised between the assignees of the bankrupt and the execution creditor is, were the goods, at the time of the seizure by the sheriffs, the goods of the bankrupt or not. Both parties claimed under the bankrupt, and an interpleader rule was therefore obtained to try the question. The assignees contend that the goods were operated upon by the bankruptcy, and belong to them; and the execution creditor says the goods were operated upon by the seizure, and that he has a right to hold them under the 108th section of the Bankrupt Act. It seems to me that the assignees are seeking to avail themselves of an infirmity in the title of the execution creditor, by reason of the title of some third person. They contend that the defendant's title is infirm, because the goods had been already seized under an execution in the suit in the Mayor's Court, and had been distrained by the landlord; but whether his title was infirm quoad those persons or not, is immaterial, for they never interfered. The question upon this issue is, which of the two parties to it had the right to the goods? I think, that as between the assignees and the execution creditor, the latter is entitled to them.

WILLIAMS, J.—I quite agree. The execution was "served and levied by seizure" within the meaning of the 108th section of the Bankrupt Act, provided the goods were the property of the bankrupt. The assignees say that the goods were his, subject, nevertheless, to the rights of Leschalles and the landlord; but that is an attempt to set up the title of third persons, which they are not entitled to do.

Rule absolute.

BELCHER and Others v. PATTEN. 1848.

ASTLEY v. FISHER.

DETINUE, in the ordinary form, for a deed.

To a declaration in detinne for a deed. defendant pleaded that he was an attorney of the Supreme Court of New South Wales; that the deed was delivered to him by plaintiff as such attorney, and that plaintiff was indebted to him for business done, by reason whereof defendant claimed a lien on the deed. The replication traversed the lien claimed. Held bad.

Held bad, for traversing mere matter of law.

Held also, that the plea was bad for not shewing that the defendant had a lien by the law of New South Wales.

Third plea. That whilst the plaintiff was possessed of the said deed, and before and at the time of the delivery thereof to the defendant, and before the detention thereof, and before the commencement of this suit, to wit, on the 1st day of March, A.D. 1836, and thence until, &c., be the defendant was and still is an attorney of her Majesty's superior Courts of law at Westminster, and a solicitor of the High Court of Chancery, and the defendant before and at the time of the delivery of the said deed to the defendant, and before the detention thereof, and before the commencement of this suit, to wit, on, &c., and thence until and at and during all the time of the accruing due of the debt hereinafter mentioned, was and still is, an attorney and solicitor of her Majesty's Supreme Court of New South Wales, in Australia, practising for fees and rewards; that the defendant being such attorney of the said Supreme Court of New South Wales, she the plaintiff, whilst the defendant was such attorney of the same Court, heretofore and before the detention of the said deed, and before the commencement of this suit, to wit, on, &c., delivered the said deed to the defendant as such attorney and solicitor of the said Supreme Court of New South Wales, to do and transact divers affairs and businesses for the plaintiff, with and in respect of the said deed in New South Wales, in Australia aforesaid, and to be used by the defendant as such attorney and solicitor of the said Supreme Court, in and about the doing and transacting of the said affairs and business for the plaintiff, with and in respect of the said deed in New South Wales aforesaid, and the same deed has ever since remained in the possession of the defendant; that the plaintiff before and at, and after the time of the delivery of the said deed as aforesaid, and before the commencement of this suit, to wit, on, &c., was and still is

indebted to the defendant in a large sum of money, to wit, the sum of 30,000L, for work before then and in New South Wales, done by the defendant as such attorney and solicitor of the said Supreme Court for the plaintiff, and upon her return and at her request, and for fees in respect thereof, and in a large sum of money, to wit, the sum of 20,000L, for money paid, laid out, and expended by the defendant as such attorney and solicitor of the said Supreme Court of New South Wales, for the plaintiff, and at her request, and by reason whereof the defendant, during all the time aforesaid, was and still is entitled to hold and detain the said deed as and for a lien for the said sums of money so due and owing to him as aforesaid, wherefore the defendant hath detained and still detains the same, as he lawfully might, for the cause aforesaid, being the detention in the said declaration mentioned. Verification.

Replication, that the defendant was not at the time of the commencement of this suit, entitled to hold or detain the said deed as and for a lien for the said sums of money in that plea mentioned, or any of them, or any part thereof, in manner and form as in that plea alleged. Concluding to the country.

Special demurrer and joinder.

Channell, Serjt., in support of the demurrer. The replication is bad; for it attempts to put in issue matter of law. [Maule, J.—It is certainly bad on that ground. If the plea had stated that the defendant was entitled to a lien by the law of New South Wales, that would have been a matter of fact; and the replication might properly have traversed it.] Secondly, the plea is good. The Court will judicially notice the right of lien of attorneys practising in the superior Courts of this country; and as the 9 Geo. 4, c. 83, s. 24 (a), has provided that the laws of England shall

(a) Enacts, "that all laws and pa statutes in force within the realm co of England at the time of the

passing of this act, (not being inconsistent herewith, or with any charter or letters patent, or order ASTLEY
v.
FISHER.

ASTLEY

FISHER

apply to New South Wales, the like judicial notice will be taken of the right of lien of attorneys practising in the Courts of that country.

Willes (Fitzpatrick with him). Assuming that the act of Parliament referred to extended the law of England as to the lien of attorneys to New South Wales, it does not follow that the law may not have been changed in New South Wales since that time. [Maule, J.—The plea does not shew that there is no "charter or letters patent, or orders in council," inconsistent with the lien claimed.]

Channell, Serjt., prayed leave to amend.

Willes opposed the application, and referred to a Judge's order, which directed that the parties should abide by the event of the demurrer.

PER CURIAM (a).—Leave to amend upon affidavits of merits, and of the law of New South Wales; otherwise

Judgment for the Plaintiff.

in council which may be issued in pursuance hereof), shall be applied in the administration of justice in the Courts of New South Wales and Van Dieman's Land respectively, so far as the same can be applied within the said colonies; and as often as any doubt shall arise as to the application of any such laws or statutes in the said colonies respectively, it shall be lawful for the governors of the said colonies respectively, by and with the advice of the legislative councils of

the said colonies respectively, by ordinances to be by them for that purpose made, to declare whether such laws or statutes shall be deemed to extend to such colonies, and to be in force within the same, or to make and establish such limitations and modifications of any such laws and statutes within the said colonies respectively as may be deemed expedient in that behalf."

(a) Coltman, J., Maule, J., and Williams, J. [Wilde, C. J., was absent from illness.]

1848.

CORDEN v. THE UNIVERSAL GAS-LIGHT COMPANY.

IN this action the plaintiff recovered judgment against the defendants, a joint stock company, completely registered under the 7 & 8 Vict. c. 110; and sued out a fieri facias against their goods and chattels. These, however, proving insufficient to satisfy the judgment, he served a number of persons alleged to have been former shareholders, and, among them, one Dominique Causse, with a notice that a motion would be made in this Court, or an application to a Judge at Chambers, for a rule or summons, calling on them to shew cause why execution should not issue against them. An application was, in consequence, made to Parke, B., who dismissed the summons; and a rule nisi, which was obtained in Trinity Term last for the same purpose, was subsequently discharged with costs, on the ground that the notice had been exhausted by the application at Chambers, and that the rule, therefore, had been, in effect, obtained without notice (a).

Another notice was served on Dominique Causse, as a shareholder for the time being, on the 24th of October, 1848, and

Phipson having, on a former day in this Term, obtained cution, under 7 & 8 Vict. a rule nisi against him accordingly,

Talfourd, Serjt., shewed cause. First, the Court will not

The discharge of a rule for issuing execution against a shareholder of a registered joint stock company, on the ground that the requisite notice was not given to him, is no bar to a second application for the same purpose.
Nor will

the Court refuse to entertain such application until the costs of the first rule have been paid.

A shareholder is presumed to continue in that character, till a transfer of his shares is duly registered.

Quare, as to the form of a writ of exec. 110, s. 68.

entertain the application until the plaintiff has paid the costs of the former rule, which, it appears from the affidavits in answer to the rule, he has not done. In Doe d. Feldon v. Roe (b), the Court stayed proceedings in an action of ejectment until the costs of a former unsuccessful ejectment, brought upon the same title by the father of the lessor of

⁽a) See Corden v. Universal Gas-Light Company, ante, p. 109.

⁽b) 8 T. R. 64 5.

CORDEN

UNIVERSAL

GAS-LIGHT
COMPANY.

the plaintiff against the same defendant, were paid; and the same principle should be extended to applications like the present one.

Secondly, the application has already been disposed of. Its object is precisely the same, and the parties to it are the same, as in the former case. It is unimportant that in the first instance, Causse was sought to be made liable as a former shareholder, while he is now charged as a shareholder for the time being; nor is it material that the former rule was discharged for want of notice, for that objection was not merely technical. Tilt v. Dickson (a), it is true the Court allowed a second application for the same purpose to be made; but that was because the rules had been obtained in the names of different persons, (the first rule being discharged because it had been obtained without the authority of the person in whose name it had been applied for.) In Reg. v. The Manchester and Leeds Railway Company (b), Lord Denman says: "The rule of practice, if not altogether universal and inflexible, is as nearly so as possible, that the Court will not allow a party to succeed, on a second application, who has previously applied for the very same thing without coming properly prepared. We are constantly acting on this principle, of which the convenience and the justice are apparent;" and again, at the conclusion of the same judgment, "I think that every party is to come at first fully prepared with a proper case, and if he fails to do so, must not afterwards renew the application with an amended case." [Maule, J.-Lord Denman is there speaking of cases in which the Court have a discretion; but have we a discretion here? Lord Denman's language is quite general, and not confined to cases where the power of the Court is discretionary. But even if the proposition is to be restricted as suggested, it will apply to this case; for the terms of the

⁽a) 4 C. B. 736.

⁽b) 8 A. & E. 413, 427, 8; S. C. 3 N. & P. 439.

68th section of the statute—" such execution may be issued by leave of the Court"—give the Court a discretion.

Thirdly, assuming that the Court will entertain the application, the affidavits in answer state that no shares were ever issued; that the whole scheme was concocted by a few designing persons, with the view of defrauding the unwary; and that although Causse lent his name to the concern, he was a victim, and not a participator in the fraud. It is true, he executed the company's deed, which contains a recital that the parties thereto had taken shares; but he is not, under the circumstances under which he did this, estopped by that recital from shewing that he was not a shareholder. Further, it only appears from the affidavits that he was a shareholder in January. 1846, not that he is now a shareholder; and the Court will not presume that he is so. In Scott v. Berkeley (a), where the Court were authorized by a special case to draw inferences like a jury, it was held that there was no ground for inferring that a director of a company, who acted in March, 1838, was a shareholder in November, 1843.

Phipson, in support of the rule. First, the principle upon which the Court acted in staying proceedings in Doe d. Feldon v. Roe (b) does not apply to this case; for, there, the merits had been tried in the former action, while in this case they were not gone into, the rule having been dismissed merely for want of notice; besides, the Court interferes to stay proceedings in ejectment under circumstances in which they would leave the defendant, in other actions, to plead a former verdict and judgment; and the reason for this is, that it is in the power of a person to bring as many new ejectments as he pleases, unless he has been restrained by the Court of Chancery; Doe v. Atherly (c); Doe d. Blachburn v. Standish (d).

CORDEN

UNIVERSAL
GAS-LIGHT
COMPANY.

⁽a) 3 C. B. 925.

⁽c) 7 Mod. 420; S. C. 2 Stra. 1152.

⁽b) 8 T. R. 645.

⁽d) 2 Dowl. 27, N. S.

CORDEN

UNIVERSAL
GAS-LIGHT
COMPANY.

Secondly, this is not a renewal of the former appli-There are two distinct classes of persons against whom execution may issue under the Joint Stock Companies' Registration Act, in the event of the property of the company being insufficient to satisfy the judgment, viz., shareholders for the time being, and former share-The first rule in this case was obtained against Causse in the latter character; but the present application is made against him as a shareholder for the time being. The case now before the Court presents a different state of things; and the rule, therefore, against hearing a second application on the same subject, is not applicable. further, that rule only applies to cases in which the Court has a discretion, which, it is submitted, it has not under this statute. The proceedings directed by the 66th and 68th sections are in substitution of the scire facias under the 7 Geo. 4, c. 46, s. 13, which was issued without the leave of the Court.

Thirdly, Causse must be taken to be a shareholder. He was a shareholder in 1846, according to his own shewing, for he executed the company's deed; and it appears from the affidavits that no transfer of any shares by him has been registered; he continues, therefore, by the 13th section of the 7 & 8 Vict. c. 110, a shareholder of the company, "so far," at least, "as respects his liability to the debts and engagements of the company."

COLTMAN, J. (a).—The first question is, whether we ought to postpone the discussion of this rule until the costs of the former one have been paid. As Causse has got an order for the payment of those costs, and it is not suggested that he cannot enforce it, I think there is no sufficient ground for declining to hear the motion. As to whether he is a shareholder, I think there can be no doubt; for by the 3rd section of the act of Victoria, every person who executes

⁽a) Wilde, C. J., was absent from illness.

the deed of settlement is a shareholder, (and it is not denied that Causse did execute this company's deed); and the 13th section provides that a shareholder continues to be so until a transfer of his shares is duly registered. The only other question is, whether, inasmuch as the plaintiff made a former application on substantially the same matter, the Court will now entertain the present motion. If the former rule had been discharged upon the merits, the Court would not have now allowed the plaintiff to renew the application; but it was discharged merely on the ground of the want of a sufficient notice. Now a new state of things is presented to us, and the plaintiff having given a proper notice, I think he is entitled to be heard, and that the rule must be made absolute.

MAULE, J.-I am of the same opinion. Upon the former occasion, the Court held that the rule could not be made absolute, because the plaintiff had not given Causse the ten days' notice required by the act. different state of facts has since arisen; the plaintiff has given a proper notice, and is entitled to the remedy That being so, it is preposterous to which he seeks. object to his application, that he is now stating something which he ought to have stated on the first occasion, and to contend that he is therefore to be deprived of the benefit which the statute conferred on him. If, upon this occasion, the plaintiff had introduced something which he might have introduced before, the Court would probably have said to him, "as you have before brought your case here in a particular way and failed, you shall not be allowed to harass your opponent by attempting, by a different course, to attain the same end." But that is not the case here; this is rather like the case of a person suing as an administrator, and, after failing because he had not taken out letters of administration, suing again, after he has obtained them. I think that there is a clear CORDEN

UNIVERSAL
GAS-LIGHT
COMPANY.

CORDEN

O.

UNIVERSAL
GAS-LIGHT
COMPANY.

distinction between this case and the class of cases referred to, as to refusing to hear second applications, and that this rule must be made absolute.

WILLIAMS, J.—The present case does not fall within either the spirit or the letter of the rule against second applications.

Rule absolute.

For marginal note, see ante, p. 379.

Phipson, on a later day in this Term, applied to the Court to direct that a writ of execution should issue, ramed in conformity with the provisions of the 68th section of the 7 & 8 Vict. c. 110, which directs that "such form of writs of execution shall be sued out of the Courts of law and equity respectively for giving effect to the provision in that behalf aforesaid, as the Judges of such Courts respectively shall from time to time think fit to order." The Judges, however, had not framed any writ in pursuance of this section.

PER CURIAM.—The plaintiff must frame the writ for himself at his own peril, and he will find little difficulty in doing so, if he follows substantially the form settled by the Judges under the 1 & 2 Vict. c. 110. Before those forms of writs were promulgated, it was held that a party was entitled to frame his writ for himself, in conformity with the provisions of that act; Erdy v. Martin (a).

(a) 6 M. & W. 480; S. C. 8 Dowl. 342.

1848.

GRAHAM v. D'ARCY.

THIS cause, and all matters in difference, were referred where an award directly by an order of nisi prius, which was afterwards made a that A. should The arbitrator, by his award, among pay whatever sums B. should rule of Court. other things, directed that the defendant should pay the be compelled plaintiff 961. 10s., but that the latter should repay the spect of a former any sum which the defendant had paid or might exchange, the be compelled to pay in respect of a bill of exchange for Court refused 2121. 15s., which the award found had been drawn and an attachment indorsed by the defendant for the accommodation of the plaintiff. Upon the bill becoming due, the defendant was stated he had sued upon it, of which he immediately gave the present been compelled plaintiff notice, and requested him to take up the bill; but refused also as this was not done, the defendant was compelled to pay 1 & 2 Vict. the amount. He then served the present plaintiff with a c. 110, s. 18, calling on A. demand in writing for the sum of 1161. 5s., the difference to show cause between the 2121. 15s. and 961. 10s., and that demand not not pay that having been complied with,

to pay in rea rule nisi for why he should

Wise moved, upon affidavits setting forth the above facts, for a rule nisi for an attachment against the plaintiff for non performance of the award; or for a rule under 1 & 2 Vict. c. 110, s. 18, calling on the plaintiff to shew cause why he should not pay the sum of 1161. 5s. requires the plaintiff to pay whatever sum the defendant was called upon to pay, and although the amount was not found by the award, the means of ascertaining it are given; and the sum actually paid upon the bill being now known, the amount payable by the plaintiff to the defendant is arrived at by a simple arithmetical process. has, therefore, sufficiently ascertained the exact sum, on the principle that id certum est, quod certum reddi potest. [Wilde, C. J.—The award does not find that the 2121. 15s. have been paid; we learn that only from the party now applying, who is swearing in his own favour.] The plaintiff GRAHAM

D'ARCY.

will, at all events, have an opportunity of contesting the truth of that statement, if the Court grants a rule nisi under the 1 & 2 Vict. c. 110, s. 18. [In support of this branch of the application, Jones v. Williams (a), and Doe v. Amey (b), were cited.]

WILDE, C. J.—The process of attachment is granted only where the party, against whom it is asked, has had distinct notice of the duty required of him; and it must also be clearly established, that there is prima facie a duty, for the neglect of which he is liable to be attached. I do not know any case in which an attachment has been granted, where the matter to be performed was left in uncertainty. Here the defendant is directed to pay a certain sum in the first instance, and the plaintiff is to repay him any sums which he may have paid, or may be compelled to pay, in discharge of a bill. It is clear that when the award was made, no duty was imposed on the plaintiff to pay this sum, for it was not ascertained; and the present application, therefore, in effect proceeds upon something not in the award. The defendant says now, for the first time, that he has been compelled to pay the amount of the bill, and that the plaintiff is guilty of a contempt for refusing to repay him the amount. To how many questions may this give rise? The plaintiff may dispute the precise amount paid, or he may deny the payment altogether; or he may allege that the payment was made under circumstances of collusion between the defendant and the holder of the bill. He may have other grounds for excusing his liability. may be said that the defendant has made an affidavit as to the payment; but the Court will not act upon the oath of a party in his own favour, when the facts may be open to dispute. There is here no distinct ascertained duty which the plaintiff has to perform, and, therefore, I think an attachment ought not to issue against him.

⁽a) 11 A. & E. 175; S. C. 4 P. & D. 217.

⁽b) 8 M. & W. 565; S. C. 1 Dowl. 23, N. S.

With respect to the application under the statute of Victoria, the case of Doe v. Amey differs materially from the present, for there the sum to be paid was ascertained by the award. Here there is nothing to justify the application of the powers of the act.

1848. Graham D'ARCY.

MAULE, J.—Where an unliquidated sum is to be paid, the Court cannot be called upon to ascertain what the precise amount is upon affidavits.

Rule refused.

BENETT v. THE PENINSULAR AND ORIENTAL STEAM BOAT COMPANY.

The declaration stated that on, &c., the defendants were possessed of a steam vessel, called the Montrose, then lying at Southampton, and about to sail for a place beyond the seas, to wit, Gibraltar, in Spain, for the carriage of passengers from Southampton aforesaid to Gibraltar aforesaid; that the defendants were then common carriers of passengers for hire, in and by the said steam vessel, from Southampton to Gibraltar; that the plaintiff was then the defendants desirous of becoming a passenger in and on board of the said steam vessel from Southampton to Gibraltar, and then, at a reasonable and proper time in that behalf, tendered Issue thereon. himself to the defendants at Southampton, to be carried by the plea only put in issue them as such passenger, in and on board the said steam vessel, from Southampton to Gibraltar, and then requested defendants the defendants to receive him as such passenger in and on sengers from board the said steam vessel, and to carry him from Southampton to Gibraltar; that the plaintiff was then ready and willing to pay to the defendants all reasonable passage they were

The declaration alleged that the defendants were common carriers of passengers from Southampton to Gibraltar, a place beyond the seas.

Plea; that were not common carriers of passengers, modo et formâ.

the fact of the carrying pas-Southampton to Gibraltar for hire, and not whether " common carriers" in

the strict technical sense of the term, and liable as such, according to the custom of England.

Quære, whether carriers of passengers from an English to a foreign port, are bound to receive and carry all passengers offering themselves, and ready to pay for their passage.

BENETT D.
PENINSULAR and ORIENTAL STEAM BOAT COMPANY.

money, hire and reward for being carried by them as such passenger from Southampton to Gibraltar, of which the defendants then had notice; that although the defendants then had sufficient room and accommodation in and on board the said steam vessel to receive the plaintiff in and on board the same as such passenger, and to carry him, as such passenger, from Southampton to Gibraltar; yet the defendants disregarded their duty in that behalf, and did not nor would receive the plaintiff as such passenger in and on board the said steam vessel, or carry the plaintiff therein from Southampton to Gibraltar, but wholly neglected and refused so to do, and then caused the said steam vessel to sail, and the same did then sail from Southampton to Gibraltar without the plaintiff; whereby, &c. The defendants pleaded, thirdly, that the defendants were not common carriers of passengers for hire, modo et formâ. thereon.

Upon the trial, before Wilde, C. J., at the sittings in London after Michaelmas Term, 1847, it was proved that the defendants were the proprietors of a number of steamers, which sailed every ten days with passengers from Southampton to Gibraltar, touching on their way at Corunna, Vigo, Oporto, Lisbon and Cadiz; that the Montrose was one of these steamers; that the defendants published and circulated printed bills stating the times at which their vessels were intended to start, the several ports to which they sailed, and the amount of the passengers' fares; and that the plaintiff had applied for a passage on board the Montrose for Gibraltar, and had been refused it by the agent of the company in consequence of some representation made to him by the Portuguese consul. It was contended for the defendants, that the duty imposed by the common law upon carriers to carry the goods of all persons offering to pay for the carriage, did not apply to the carriers of passengers, nor to carriers to foreign parts, and that they were therefore entitled to the verdict upon the third issue. The Lord Chief Justice thought that there was evidence to go to the

jury that the defendants were "common carriers;" and a verdict having been found for the plaintiff, leave was given to the defendants to move to have it entered for them upon the third issue.

BENETT S.
PENINSULAR AND COMENTAL STRAM BOAT COMPANY.

The Attorney General having accordingly, in the following Term, obtained a rule nisi to enter the verdict for the defendants, and also for a new trial;

Petersdorff now shewed cause. The objections made at the trial, and upon moving for this rule, appear upon the declaration, and therefore the motion ought to have been to arrest the judgment. It would be useless to grant a new trial, and the Court will not do so, when the declaration discloses no cause of action. [Maule, J.—The rule is not only for a new trial, but to enter the verdict for the defendants on the third issue. The objections may arise upon that issue]. The question raised by the third issue is merely whether the defendants were carriers of passengers between Southampton and Gibraltar, not whether they were "common carriers" in the strict legal meaning of that term, and subject as such to certain liabilities. The declaration, it is true, alleges that they were "common carriers" from an English to a foreign port; but that description does not involve an allegation of their liability as "common carriers," according to the custom of England. There is no ground for complaining of misdirection, because the Judge left the question upon the third issue to the jury in the precise words of the declaration. [He was then stopped by the Court].

Ogle, in support of the rule. Where a breach of duty is the cause of action, it is necessary that the consideration for the performance of the duty should be set forth in the declaration, except where the duty arises from custom; and even then, the practice formerly was to set out the custom, in order to shew that no consideration was necessary, though it is now well understood that it is needless to aver the

BENETT v.
PENINSULAR and ORIENTAL STEAM BOAT COMPANY.

custom when it is a general one, such as that relating to carriers, innkeepers, &c.; 1 Chit. Pl. 239, 7th ed. In the declaration in this case no consideration is stated, and it therefore follows that the declaration intended to rely on the custom, otherwise the declaration would be bad. The defendants are described as "common carriers"—words which have a legal technical meaning, importing that they are bound to carry. The issue raised upon the third plea, therefore, is, whether the defendants are "common carriers" in the strict technical sense, and there is no other way in which that question could have been raised. [He referred to Story on Bailments, sect. 496.]

WILDE, C. J.—It seems to us that there is no ground for making the rule absolute for setting aside the verdict upon the third plea. The declaration alleges that the defendants were common carriers of passengers from Southampton to a place beyond the seas, that is, a place out of the realm. The defendants plead that they were not common carriers, as in the declaration alleged, that is from Southampton to The evidence for the plaintiff was, that the defendants had issued bills, in which they professed to carry passengers from Southampton to Gibraltar; that their practice was in conformity with those bills, and that they had refused to carry the plaintiff. On that evidence, I left it to the jury to say, whether the defendants had carried on the business of common carriers of passengers from Southampton to Gibraltar, as alleged in the declaration; and the jury found that they had. The question now is, whether, upon this evidence, I was right in so leaving the question to the jury. It is to be observed, that the defendants are described in the declaration as "common carriers" from a place within, to a place without, the realm; and it is asked, can they be such common carriers? Mr. Justice Story, in his book, which has been referred to, says: "A common carrier has been defined to be one who undertakes, for hire or reward, to transport the goods of such as choose to employ him, from

place to place;" that is, one who does that which the defendants were proved to do with respect to passengers. But it is said that they were not proved to have been "common carriers" as in the declaration alleged, because the term "common carriers" imports that they are common carriers within the realm, and according to the custom; and that we are bound to put that construction upon the declaration, upon the principle that when an averment is open to two constructions, that one must be put upon it which will support the pleading. But if we read the words "common carriers" as "common carriers within the realm," we make the declaration inconsistent; whereas if they be read according to Mr. Justice Story's definition, as common carriers from Southampton to Gibraltar, the declaration is consistent throughout. The words, it is true, are often used to mean common carriers within the realm, but I see no reason for saying that they are necessarily confined to that class, and are not applicable to carriers out of the realm. It seems to me, therefore, that the declaration and the issue raised by the third plea ought to be understood in the sense in which it was proved by the evidence, and that there is no reason for disturbing the verdict.

COLTMAN, J.— Mr. Ogle's argument is founded chiefly upon precedents of declarations in actions against common carriers by land. In those cases, the usual form alleges that the defendant was a common carrier of goods for hire from a certain place to a certain other place, and goes on to state the delivery of the goods to the defendant to be safely carried to the place where they are to be delivered. These places are primâ facie understood to be within the realm, and then, as the defendant is stated to be a common carrier between two places in England, his liability arises from the custom of England, and it is not necessary to allege it. But is that the meaning of the declaration? I think not. It shews that the defendants were carriers, not between two places within the realm, but from a place within the realm

BENETT

DENINBULAR

and
ORIENTAL
STEAM BOAT
COMPANY.

BENETT D.
PENINSULAR and
ORIENTAL STEAM BOAT
COMPANY.

to another beyond the seas, and also that they were carriers not of goods but of passengers. Whether any duty arises from that business, is another question. The evidence shewed that the defendants held themselves out as carriers of passengers between Southampton and Gibraltar, and that was the question in issue upon the third plea. The declaration alleged that they were carriers of a certain description, that averment was traversed by the third plea, and I think that the Judge was right in the way he left the question to the jury, and therefore that this rule ought to be discharged.

MAULE, J.—I am also of opinion that the verdict should The question of fact raised was, whether not be disturbed. the defendants were common carriers of passengers between Southampton and Gibraltar, the latter being a place beyond the seas; and I think that the issue was properly found for the plaintiff. It is true, the expression in the declaration is ambiguous, but as the defendants did not demur, but pleaded over, it must now be understood in the sense in which it will support the declaration, although it may be that the declaration would be bad, if the places mentioned in it were not both within the realm; and good, if they were. But it was said that any place mentioned in a declaration is to be taken to be within the realm, unless the contrary be stated. There is a case, the name of which I do not at this moment recollect, in which a bill of exchange was stated to have been drawn at Dublin, but there was no allegation that that place was not in England, and it was held that the Dublin mentioned must be presumed to be some place in England (a). So, I apprehend, if a declaration stated that the defendant was a common carrier between London and New York, it would be understood, unless the contrary were stated, that both places were in England,

⁽a) The learned Judge probably referred to Kearney v. King, 2 B. & A. 301, or to Sprowle v. Legge, 1 B. & C. 16.

although New York is well known to be a place in America. Here, however, there is no doubt the declaration sufficiently shews that Gibraltar is a place beyond the seas. not disputed either now or at the trial; but it is suggested by Mr. Ogle that the allegation that the defendants were common carriers between Southampton and a foreign port, means, somehow or other, that they were subject to the same liabilities as carriers within the realm. I cannot concur. The termini being established, the only question was, whether the defendants did those things which, Mr. Justice Story says, was understood to constitute a man a common carrier. One of the points made by the Attorney General, on moving for the rule, was, that the liability of common carriers of goods, and that of common carriers of passengers, is different. How that may be, it is not necessary to say, because the allegation in the declaration can mean nothing else than that the defendants were constituted carriers of passengers, by doing that, in reference to passengers, which, if done with goods, would have made them carriers of goods according to Mr. Justice Story. Suppose a law were passed doing away with the liability of common carriers, a common carrier would nevertheless be still a common carrier, and the evidence to prove the fact would be the same. Or suppose the case of a common carrier between two places in New South Wales, and that the law of that country as to his liability differs from the law of England, the fact to be proved on an issue whether he was a common carrier would be the same, whatever were the extent of his liability; and the issue would be proved by the same evidence. I think, therefore, that the plaintiff was entitled to the verdict.

WILLIAMS, J.—I am entirely of the same opinion. The issue arises on a traverse of the allegation that the defendants were common carriers of passengers between Southampton and Gibraltar. Upon that issue it was necessary for the plaintiff to prove not only that they were common carriers

BENETT

DENINGULAR

AND

ORIENTAL

STEAM BOAT

COMPANY.

BENETT

D.

PENINSULAR

and

ORIENTAL

STEAM BOAT

COMPANY.

between those two places, but also common carriers of passengers. I think that was proved by the evidence, and that the plaintiff is therefore entitled to keep his verdict. If the law be that persons, such as the defendants are described in the declaration, are not liable to this action; that would be good ground for arresting the judgment, or bringing a writ of error.

Rule discharged.

GRIFFIN v. BRADLEY.

An application to rescind a Judge's order must be made within a reasonable time; and where a party does not apply within reaonable time to rescind the order, he must be presumed to acquiesce in it. Two years after the date

of the order, is not a reasonable time. BY an order made at Chambers by *Pollock*, C. B., on the 5th of August, 1846, proceedings in this action were stayed until further order, on the ground of the pendency of another action for the same debt.

T. Jones having, on a former day in this Term, obtained a rule nisi to rescind that order,

Corrie shewed cause. The application is two years too late. It ought to have been made in the next Term after the order was made; 2 Chit. Archb. Prac. 1443, 8th ed.

T. Jones, in support of the rule. The Judge had no jurisdiction to make the order. In Giles v. Tooth (a), this Court refused to stay the proceedings in ten out of eleven actions which the plaintiff had brought against different directors of a railway company for the same cause of action; and that case was followed by the Queen's Bench in Newton v. Belcher (b), where a Judge's order for a stay of proceedings, in two of three actions brought for the same demand, was rescinded. [Wilde, C. J.—Why did you lie by for two years, instead of objecting at once?] The application is

⁽a) 3 C. B. 665; S. C. ante, vol. 4, p. 486.

⁽b) 9 Q. B. 612.

not too late; the Judge had no jurisdiction to make this order, and, therefore, the plaintiff ought not to be prejudiced by it. The order has deprived the plaintiff of a right which the law gives him, of suing those persons who are liable to him, and unless the other side shew that they have been prejudiced by the delay, which they have not done, it is submitted the plaintiff may come after the lapse of any length of time, and complain of the order.

Gaiffin v.
Bradley.

WILDE, C. J.—In this case, the order for staying proceedings until further order, on the ground that there was another action pending, was made upwards of two years ago. I apprehend there can be no doubt that a Judge at Chambers has power to order the stay of proceedings in an action, for the purpose of giving a party an opportunity of going to the Court; and the exercise of that power is not inconsistent with the plaintiff's common law right of suing. A person has, no doubt, a right at common law to sue all parties liable to him; but a Judge has, at the same time, power to prevent him from using that right in an oppressive manner. If the circumstances of the case do not warrant the exercise of that power, the party aggrieved by it ought to come to the Court. Then the question is, within what time ought he to come? It is said that there is no time fixed by any inflexible rule. But, at least, he ought to come within a reasonable time, and two years are surely not a reasonable time for such a purpose. A party who obtains an order has a right to know whether it is acquiesced in; and if the other side do not go to the Court for two years, that is certainly strong evidence of acquiescence. plaintiff might, indeed, have applied to the Court or a Judge for leave to go on; but he does not ask this. asks us to rescind the order; and I think the answer to his application is, that he has acquiesced in the order, by suffering two years to elapse without applying to the Court. Without laying down any positive rule as to the time for applying to rescind a Judge's order, it is sufficient to say

1848. GRIFFIN BRADLEY.

that it ought to be done within a reasonable time. appears that the order was incorrect in form, because it ordered proceedings to be stayed till further order, and not till a definite time; but we cannot upon this rule give the plaintiff the relief he might probably have had, if he had applied for leave to go on.

COLTMAN, J., MAULE, J., and WILLIAMS, J., concurred.

Rule discharged.

LOMAX v. LANDELLS.

To a declaration upon a bill by indorsec against acceptor, defendant pleaded that the bill was indorsed in blank; that when it became due one I. Shakespear Williams was the holder of it; that the defendant gave the said L. Shakespear Williams 10L in cash, and a promissory note for 151. 15s. for the bill, and all interest, charges, and claims in respect of it. Averment, that defendant had not, and had not been

ASSUMPSIT on a bill of exchange drawn by one Hine, accepted by the defendant, and indorsed by Hine to the plaintiff. Plea, that the indorsement by Hine was in blank, and that when the bill became payable, and thence until the agreement thereinafter mentioned, the bill was in the hands of one I. Shakespear Williams, as the lawful holder and owner thereof, for value, who was then entitled to receive the amount from the defendant; and that after the bill became due, and whilst the said I. Shakespear Williams was the lawful holder and owner thereof, it was agreed between the defendant and I. Shakespear Williams, that the defendant should pay to I. Shakespear Williams part of the amount of the said bill, to wit, the sum of 10L, and that the defendant should then make and deliver to the said I. Shakespear Williams his, the defendant's, promissory note, payable to the order of the said I. Shakespear Williams, for the sum of 151 15s., payable three months after date, on account of the residue of the said bill, and all

able to obtain, knowledge of the first Christian name of Williams, "otherwise or to a greater

extent than as set forth by the said initial letter."

Held, on special demurrer, first, that the plea was a good plea of payment: secondly, that the plea sufficiently set forth the title of Williams to the bill, and was not bad for omitting to allege that after the bill had been indorsed in blank, it was delivered to Williams; and thirdly, that the Court would intend that "I." was the Christian name of Williams, and not merely the initial letter of it.

interest, charges, and claims whatsoever in respect of the Averment, that afterwards and whilst the said I. Shakespear Williams was the lawful holder, and after the bill became due, and before the plaintiff became possessed of it, or had any right or title in respect of it, or any part of the amount thereof, in pursuance of the agreement, the defendant paid I. S. Williams the 101, and delivered to him the promissory note for 15L 15s., and paid it when due; and that the said bill was overdue when the plaintiff first took and received the same, and before the plaintiff ever had any title to the said bill, or any part of the amount thereof; that the defendant hath not, nor has he had, at any time, knowledge of the first or Christian name of the party thereinbefore designated as I. Shakespear Williams, otherwise or to a greater extent than as set forth by the said initial letter, nor hath the defendant been able to obtain any knowledge of the said first name, otherwise or to a greater extent than as aforesaid, although he has made proper inquiry in that behalf. Verification.

Special demurrer, assigning for causes that the plea was an argumentative and insufficient plea of payment; that no sufficient excuse was stated for the omission of the first or Christian name of the person designated as I. Shakespear Williams, and that the title of I. Shakespear Williams to the bill was not shewn with sufficient certainty. Joinder in demurrer.

Hawkins (Barnard with him) in support of the demurrer. First, the plea is bad on special demurrer, for omitting to set out the Christian name of Williams, and for not excusing such omission by a proper averment; Stephen on Pleading, 338, 5th ed.; Appelmans v. Blanche (a). The matter of excuse is so averred that it is not traversable, for the "L" is referred to as the said initial letter. [Maule, J.—If you say that the "L" is what is referred to by the words "said

Lomax v.
Landells.

LOMAX
D.
LANDELLS.

initial letter," you assume the point in dispute.] is the only thing to which those words can apply. Court has held that a single letter, like the letter "W." is not a Christian name; Nash v. Collier (a): and the Queen's Bench have decided, that every person must be presumed to have a Christian name; Levy v. Webb (b); Gatty v. Field (c). It therefore follows that every person must be presumed to have a Christian name, which must consist of two letters at least. [Maule, J.—No. A Christian name must be a word; but a word does not necessarily consist of two or more letters. Every vowel is a word, for it can be pronounced without the aid of any other letter. A consonant is different, for it cannot be pronounced without the aid of a vowel.] Secondly, the plea is bad for not stating that the bill was delivered to Williams after its indorsement in blank; so that it does not appear that he had a legal interest in it at the time that he was the holder of it. [Maule, J.— The defendant is not stating his own title, but that of the plaintiff, through a third person; and when he describes the latter as the lawful holder of the bill, he means, of Thirdly, the plea is bad, course, after indorsement.] because it is pleaded to the whole declaration, though in truth it is only an answer as to 10%. Williams's right of action was not suspended or extinguished by his acceptance of the 10L and of the promissory note; and it is quite consistent with the plea that the plaintiff became the lawful holder of the bill before the note became payable; for the plea does not state that Williams was the holder of the bill when the note became payable. If the plea be in effect a plea of payment, it is bad for not specifically averring payment. [Maule, J.—It does so sufficiently; it alleges that the defendant has so paid the bill that the plaintiff cannot now recover upon it.] Still it leaves the declaration unanswered as to the damages. [Maule, J.—It alleges that the promissory note was given on account of the residue of

⁽a) Ante, vol. 5, p. 341; S. C. (b) 9 Q. B. 427. nom. Nash v. Calder, 5 C. B. 177. (c) Id. 431.

the bill, "and the interest, charges, and claims in respect thereof."

1848. LONAX LANDELLS

Corrie contrà, was desired to confine himself to the first Admitting "I." is merely the initial of a name, and not itself a name, still the plea is sufficient, for it contains a sufficiently distinct allegation that the name is not known to the defendant; Stephen on Pleading, 339, 5th ed., and cases there referred to. But "I" may be the name of the party.

PER CURIAM (a).—We are always unwilling to suffer an objection of this kind, which is so wholly beside the merits of the case, to prevail; and we have on former occasions resorted to subtlety in order to do justice. In this case, it is sufficient to say that "L" may possibly be a Christian name.

Judgment for the Defendant.

(a) Coltman, J., Maule, J., and Williams, J.

COULING v. COXE.

CASE against a witness for disobedience to a subpœna. In an action The declaration, after alleging that the plaintiff had sued against a witness for not one Thomas Foulkes in an action of trespass, and that obeying a sub-

poena, proof of actual damage

having been sustained by the plaintiff through the witness' breach of duty is essential, as the law will not imply a loss to the plaintiff from a mere disobedience to a subposna.

The action will lie if the witness' evidence was material upon any one of the issues, even

The action will be it the winess evidence was material upon any one of the issues, even though the plaintiff had not a good cause of action.

The declaration alleged that plaintiff had brought an action against F.; that certain issues came on to be tried; that defendant was subprensed by plaintiff; that plaintiff had a good cause of action, and that the defendant's evidence was material to the trial of the issues. Breach, neglect to attend; whereby the plaintiff had to pay certain costs to F., and lost the benefit of certain costs which he had incurred, &c.

The defendant pleaded several pleas traversing the material allegations in the declaration, and among them, eighthly, a traverse that plaintiff had a good cause of action, and ninthly, a traverse that defendant's evidence was material; he also pleaded the general issue, and loave and license. The jury having found for defendant on the eighth issue, and for the plaintiff on all the others.

Held, first, that the eighth plea travorsed an immaterial allegation. Secondly, that the allegation that the defendant was a material witness on the issues was, after verdict, a sufficient allegation that plaintiff would have succeeded on some of them, if the defendant had given his evidence; and thirdly, that the plaintiff was entitled to judgment non obstante veredicto, and that a repleader was unnecessary.

COULING b. Coxe.

certain issues, before then joined in that suit, came on to be tried at Kingston, stated the issuing and service on the defendant of a writ of subpœna on behalf of the plaintiff. The declaration then averred that the plaintiff had a good cause of action in the said suit, and that the appearance and testimony of the now defendant, in obedience to the writ of subpœna, were necessary and material to the trial of the said issues. Breach, that the now defendant, without lawful excuse, neglected to appear and give evidence, by reason whereof the plaintiff was obliged to withdraw the record, and was compelled to pay certain costs to the said Foulkes, and lost the benefit of certain costs which he, the plaintiff, had incurred in proceeding to the trial of the said issues.

Pleas: first, not guilty; secondly, thirdly, fourthly, fifthly, sixthly, and seventhly, traverses of material allegations in the declaration; eighthly, that the plaintiff had not a good cause of action, modo et formâ; ninthly, that the testimony of the defendant was not material to the trial of the issues; and tenthly, leave and licence. Issues thereon.

Upon the trial before *Parke*, B., at the Guildford Summer Assizes, 1846, the jury found for the plaintiff upon all the issues except the eighth; and upon that issue they found for the defendant.

Lush having, in the following Term, obtained a rule nisi on the part of the plaintiff to set aside the verdict upon the eighth plea, and for a repleader, or to enter up judgment for the plaintiff non obstante veredicto, or for a new trial on the ground that the verdict on the eighth issue was against evidence;

Pearson, shewed cause. First, it was said when this rule was obtained, that the issue raised by the eighth plea is immaterial; but that is not correct. The declaration in Masterman v. Judson (a) did not, it is true, aver that the

plaintiff had a good cause of action, but it stated that the defendant was a material witness, and that by reason of his disobedience of the subpæna, and on no other account, the plaintiffs were nonsuited; and this was held sufficient after So in Davis v. Lovell (a), although there was no positive allegation that the plaintiff had a good cause of action, the declaration was held good on general demurrer; because it contained several allegations, which, taken together, amounted in substance and effect to such an averment. So in Mullett v. Hunt (b), although the declaration which omitted the allegation in question was held sufficient; yet that was, like Masterman v. Judson, after verdict, and the declaration stated that the evidence which the witness could have given was material for the plaintiff, and that the plaintiff could not have safely proceeded to trial without it. "No evidence," observed Lord Lyndhurst, C. B., in giving judgment, "could be material in the cause unless the plaintiff had a good cause of action." All these cases are, in truth, authorities in support of the materiality of an averment, if not in terms at least in effect, that the plaintiff had a good cause of action. The declaration does not allege that the evidence of the defendant was material for the trial of the cause, but only that it was material for the trial of the issues in the cause. Lovell, and Amey v. Long (c), are in this respect distinguishable; for, in both cases, there was only one issue in the actions in which the evidence of the witnesses was material, and therefore, if their evidence was material for the trial of the issue, it was material for the trial of the whole cause. But here, there were several issues in the original action, and the declaration does not allege that the evidence of the witness was material in the trial of all of them, or even of such of them as would entitle the

plaintiff to judgment. In Needham v. Fraser (d), the alle-

Couling b.

⁽a) 4 M. & W. 678; S. C. 7 (c) 9 East, 473.

Dowl. 178. (d) 1 C. B. 815; S. C. ante, vol. 3, p. 190.

VOL. VI. D D D. & L.

COULING v. Coxe.

gation that the plaintiff had a good cause of action was not traversed, and the defendant was, therefore, not allowed to controvert it at the trial, even by the evidence which his opponent had put in. [Maule, J.—Suppose an action of trespass, in which defendant pleads not guilty and a right of way, and a witness who might have proved that the plaintiff was entitled to a verdict on the first issue, does not attend. Would it not be very hard that the plaintiff should not be able to maintain an action against him for his non-attendance, merely because he had no cause of action on the second issue?] That case is different from the present one. declaration ought to have pointed out in respect of which issues the plaintiff had a good cause of action, and have alleged that the defendant was a material witness in support of such issues. But that has not been done; the plaintiff, by alleging that he had a good cause of action, and that the evidence of the witness was material to the trial of the issues, has tied himself down to prove that the evidence of the witness was material to the trial of all the issues; 1 Chit. Plead. 251, 7th edit. The eighth plea cannot be read distributively as a traverse of the plaintiff's cause of action on each issue, but must be taken in its obvious sense, as a traverse of the plaintiff's cause of action generally; 2 Wms. Saund. 206, n. 21, 22; Smith v. Dixon (a). And as the jury have found a verdict for the defendant on the eighth issue, it follows that the plaintiff had no good cause of action on any of the issues, and consequently that the defendant could not have been a material witness in support of any of them. [Maule, J.—You are contending that the verdicts on the eighth and ninth traverses are inconsistent.]

Secondly, the plaintiff is not entitled to judgment, non obstante veredicto, for the eighth plea is not in confession and avoidance; Atkinson v. Davies (b); Gwynne v. Burnell (c).

⁽a) 7 A. & E. 1; S. C. 2 N. 2 Dowl. 778, N. S. & P. 1; 6 Dowl. 47. (c) 6 Bing. N. C. 453; 1 Scott, (b) 11 M. & W. 236; S. C. N. R. 711; S. C. 7 Cl. & F. 572.

The Court will only grant a repleader. [He referred to Gordon v. Ellis (a).]

Couling b.

Lush, contrà. First, it is not necessary, in order to maintain such an action as this, to prove that the plaintiff had a good cause of action in the original action. There is no decision precisely in point; but unless it appears that an action has been brought wantonly, and with full knowledge that it was not maintainable, the Court will always presume that it was brought by the plaintiff in the bonâ fide belief that he has a good cause of action. And in all such cases, it is reasonable that the plaintiff should have the benefit of any evidence which he may think material to his cause, even though he be mistaken as to his having a good cause of action. It would be dangerous to the administration of justice to permit the witnesses of a plaintiff to obey or disobey a subpæna, according as they believed that the action was well founded or not.

Secondly, if the rule laid down in Gwunne v. Burnell be of universal application, it is admitted that the plaintiff is not entitled to judgment non obstante veredicto, but that a repleader will be awarded; because the plea upon which the issue has been found against the plaintiff, is a traverse, and not in confession and avoidance. The allegation, however, which that plea traversed, was, it is submitted, immaterial, and its omission would not only not have made the declaration bad, but it would not even have affected the amount of damages to be recovered; for it was immaterial, as regards the question of damages, whether the defendant's evidence was necessary upon one, or upon all, the issues, his absence being the cause why all of them remained untried. If the ninth plea had traversed that the defendant's evidence was material upon all the issues it would have been bad. If, therefore, the allegation traversed by the eighth plea was immaterial, and might have been struck out altogether, it is

⁽a) 7 M. & G. 607; S. C. 8 Scott, N. R. 290; Ante, vol. 2, p. 308.

Couling v. Coxr.

submitted that a repleader would be useless, and that the Court will give judgment for the plaintiff non obstante veredicto; because, besides this immaterial issue, which was found for the defendant, there are others which are material and decisive of the whole cause of action which have been found for the plaintiff; Negelen v. Mitchell (a). [Cresswell, J., referred to 2 Wms. Saund. 319 e, n. (h), 6th edit.]

WILDE, C. J., now delivered the judgment of the Court.— This was an action for not obeying a subpœna, which called on the defendant to appear as a witness for the plaintiff at the trial of an action brought by him against one Thomas Foulkes. [His Lordship stated the nature of the pleadings]. On the trial before Parke, B., a verdict was found for the plaintiff on all the issues, except that on the eighth plea, with 1s. damages. The verdict on the eighth plea, which denied that the plaintiff had a good cause of action against Foulkes, was for the defendant. A rule was obtained, calling on the defendant to shew cause why the verdict should not be set aside and a repleader awarded, or why final judgment should not be entered for the plaintiff, notwithstanding the verdict for the defendant on the eighth plea, or why a new trial should not be had on the ground of the verdict on the eighth plea being against evidence. On shewing cause against this rule, it was admitted that, so far as it was for a new trial and for a verdict against the evidence, it could not be supported; and the argument turned on the question whether the eighth plea, which denied that the plaintiff had a good cause of action in the former suit, was a sufficient answer to the action against the witness for not attending; and supposing it not to be sufficient, what ought to be the judgment? With respect to the validity of the plea, it is to be observed that the declaration is for the injury sustained by the plaintiff in consequence of the breach of duty by the defendant in not obeying the subpœna, and by means of which breach of

duty, the declaration alleges the plaintiff was delayed in recovering his damages against Foulkes, and also was obliged to pay him certain costs, and also that certain costs incurred by the plaintiff in proceeding to trial became useless. And the question is, whether the want of a good cause of action against Foulkes shews that the plaintiff is not entitled to recover for any part of this matter of complaint; for unless it has that effect, the plea, being pleaded to the whole cause of action, is bad. Before the statute of Anne, which enabled the defendant to plead several matters,--or, since that statute, when only one issue has been joined, a plaintiff who had no cause of action could not, under ordinary circumstances, sustain any damage from the absence This is the reason why in several of the cases of a witness. which have been determined on the subject of actions for disobeying subpænas, when it did not appear that more than one issue was joined, the Court have considered that an allegation of a good cause of action, either in express terms, or in terms which were held to imply it after verdict, was necessary to sustain the judgment for the plaintiff; because, in the absence of such an allegation, the declaration did not shew the plaintiff had sustained any particular loss or damage by the non-attendance of the defendant; and in an action such as this, for breach of duty,—not arising out of contract between the plaintiff and the defendant, but-for disobeying the order of a competent authority, the existence of actual damage or loss is essential to the action, as the law will not imply a loss to the plaintiff from mere disobedience to the subpœna. But when, since the statute of Anne, there are several issues, it may be that the plaintiff has no cause of action, but yet that he may have sustained damage in respect of the costs of some of the issues, on which (although failing in his suit generally) he might have succeeded by the testimony of the witness, if he had attended in obedience to his subpæna. It is clear that the terms of this declaration comprehend such damage, and that the allegation that the defendant was a material witness on the issues is, after verdict, a sufficient allegation that the plaintiff Couling v.

Couling v. Coxe.

would have succeeded on some of them, if the witness had given his evidence; and consequently, that he may have sustained pecuniary loss from the absence of the defendant, although he had no cause of action against Foulkes. eighth plea, therefore, although it shews that the plaintiff could not have been damnified by the delay of recovering damages against Foulkes, and would, therefore, be a good plea to a declaration complaining of no other wrong, does not shew that he has sustained no damage in consequence of the absence of the defendant. That plea, therefore, cannot be supported as shewing that the plaintiff has sustained no loss. But a question was suggested by the Court, whether it might not be supported, as shewing that the plaintiff, although he had sustained a loss, had no right to sue for it as an injury; because, inasmuch as having no cause of action against Foulkes, he was guilty of a wrong in suing him, and could not recover against the defendant for a loss sustained in seeking to enforce a wrongful claim, for which, according to the old law (which is still in form observed), he was liable to amerciament. But we think, on consideration, that although, as respects the lord whose Court has been occupied by a claim which could not be sustained, the plaintiff would be liable to make a pecuniary satisfaction by amerciament; yet that he has, against such a wrong doer, the right to have the material testimony of a witness in support of issues on which he is entitled to succeed, in order to obtain costs to which his right is recognised by law. The eighth plea, therefore, as it does not answer the whole declaration to which it is pleaded, is insufficient; and the defendant, who has failed in all the other pleas, is not entitled to judgment.

The second question is, what judgment should be given on this record, taking the eighth plea to be bad? Before the statute of Anne, the question whether there should be a repleader or judgment non obstante veredicto, depended on whether the plea, on which the immaterial issue arises, admits a cause of action by way of confession and avoidance. But since that statute, it has

been held, that although the plea, on which the immaterial issue was found for the defendant, did not confess the cause of action, if it was confessed or proved on the other pleas which were found for the defendant, there should be no repleader, but judgment for the plaintiff. And even although the pleas on which the good issues have been taken and found for the plaintiff, were not pleas in confession and avoidance, but traverses of material allegations in the declaration, and although some of the material allegations were neither traversed nor proved, nor admitted by way of confession and avoidance, it has been held that where the other material pleas enabled the Court to give judgment, without requiring the parties to replead, in order to shew on which side the right was, there should be no repleader but judgment non obstante veredicto; see Goodburne v. Bowman (a), Negelen v. Mitchell (b). Indeed, a plea traversing an allegation in a declaration, although not for all purposes, nor in all events, an admission of the material allegations in the declaration which it does not traverse, yet may be considered as a conditional admission, that is, as admitting the allegation not traversed, in case the plaintiff can prove the allegation traversed; and it is certainly so treated in the case in which, on a single plea traversing a part of the declaration, where an issue is found for the plaintiff, the plaintiff has judgment; which he could not be entitled to, unless the Court considered the material allegations which were not traversed, as being admitted; and the same consequence follows if several material traverses are all found for the plaintiff. In the present case, several traverses on material allegations of the declaration are found for the plaintiff, who has also obtained a verdict on the plea of leave and licence, which is a plea in confession and avoidance; and the only issue found for the defendant does not shew that the plaintiff has no cause of action. the Court, therefore, have no difficulty in saying that the plaintiff, and not the defendant, is entitled to judgment, and

COULING B. COXE. Couling v.

have no reason to award a repleader to discover which is right. The rule, therefore, to enter judgment for the plaintiff on the eighth plea, non obstante veredicto, must be made absolute.

Rule absolute.

LEADER and Another v. PURDAY.

The 16th section of the Copyright Act (5 & 6 Vict. c. 45), which requires a defendant intending to set up the title of a third person, to the copyright alleged to have been infringed, to specify, in the notice of objection, the name of such person, &c., precludes a defendant who has omitted to give such notice, from taking such objection even where it arises upon the plaintiff's evidence. CASE. The declaration stated that there was a subsisting copyright in a certain book, to wit, a musical composition called Pestal; that the plaintiffs were the proprietors of such copyright, and had published and sold many copies of the work; that the defendant, after the passing of a certain act (5 & 6 Vict. c. 45), knowingly, and without the consent in writing of the plaintiffs, in a certain part of the British dominions, to wit, in Great Britain, printed and published for sale divers, to wit, 3,000, copies of the said book, contrary to the form of the statute, &c.

Pleas: first, not guilty; secondly, that there was not a subsisting copyright in the said book, or any part thereof; thirdly, that the plaintiffs were not the proprietors of the said work, or any part thereof.

The defendant gave the plaintiffs notice, under the 16th section of the 5 & 6 Vict. c. 45, that he would rely upon the following objections on the trial of the action: first, that the plaintiffs were not the first publishers; secondly, that they were not the owners of the copyright; thirdly, that there was no subsisting copyright in the musical composition; and, fourthly, that the air was not composed by Pestal, but had been fraudulently published under that name for the purpose of deceiving the public.

Upon the trial before *Cresswell*, J., at the sittings in London after Michaelmas Term, 1847, it was proved that the air was an old one, and well known both in this country and on the Continent; and that a Mr. Bellamy having, early

in 1844, written some English words to the air, and induced a Mr. Horn to compose an accompaniment to it, had, on the 24th of October, 1844, agreed to sell to the plaintiff Leader, the copyright of the composition in its altered In pursuance of this agreement, he executed, in 1847, a formal assignment of the copyright, by deed, to the plaintiffs, and the song was shortly afterwards published by them, with a preface written by Bellamy, which attributed the composition of the air to a state prisoner in Russia, under sentence of death. The defendant published the song with the same words, preface and accompaniment, and with similar type, frontispiece, and general appearance. No evidence was given of any assignment by Horn to the plaintiffs, and it was contended that without such evidence the plaintiffs were not entitled to a verdict, as the copyright in the accompaniment was vested in Horn. It was also objected that the plaintiffs must fail, because it appeared that there existed no copyright in the air, and also because Bellamy's interest had been completely transferred to Leader alone, by the agreement of October, 1844, and consequently did not pass to the plaintiffs under the deed of assignment of May, 1845. The learned Judge overruled the objections, and having left it to the jury to say whether there had been any infringement of the copyright, a verdict was found for the plaintiffs, damages 1s.; leave being reserved to the defendant to move to set aside the verdict, and have it entered for him, or for a nonsuit.

A rule nisi having been obtained accordingly,

Talfourd, Serjt., and Petersdorff, shewed cause. It is not open to the defendant to object, under his notice of objections, that the copyright in the accompaniment belongs to Horn and not to the plaintiffs; for the 16th section of the 5 & 6 Vict. c. 45, requires "that if the nature of" the defendant's "defence be, that the plaintiff in such action" is not the proprietor of the copyright therein, or that some other person than the plaintiff was the author or first

LEADER and Another v. Purday.

LEADER and Another v. Punday.

publisher of such book, or is the proprietor of the copyright therein, then the defendant shall specify in such notice the name of the person who he alleges to have been the author or first publisher of such book, or the proprietor of the copyright therein, together with the title of such book, and the time when, and the place where, such book was first published, otherwise the defendant in such action shall not, at the trial or hearing of such action, be allowed to give any evidence that the plaintiff in such action was not the author or first publisher of the book in which he claims such copyright as aforesaid, or that he was not the proprietor of the copyright therein; and at such trial or hearing, no other objection shall be allowed to be made on behalf of such defendant than the objections stated in such notice," &c. Here the defendant's notice of objections gives the plaintiffs no further information of the grounds of defence intended to be relied upon, than the pleas did. It does not specify the name of the person whom the defendant alleges to be the proprietor, nor the title of the work, nor the time when, nor the place where, the work was first published; all which particulars it was incumbent on him to set forth; Boosey v. Davidson (a). [They contended, also, that the composition was protected by the 5 & 6 Vict. c. 45, although no copyright was proved in the air alone; that Bellamy was the author of the work in its present shape, and had originally a copyright in it, and that that copyright had vested in the plaintiffs by the deed of May, 1845, and had not passed under the agreement of October, 1844.]

Couch, in support of the rule. The provisions of the 16th section, it is submitted, do not apply to a case like this, where the particulars, of which notice is directed to be given, lie peculiarly within the knowledge of the plaintiff. The plaintiffs themselves proved that Horn was the proprietor of the copyright in the accompaniment. What necessity, then, could exist for requiring from the defendant a notice

(a) Ante, vol. 4, p. 147.

The object of the statute was merely to proof this fact? tect the plaintiff from being taken by surprise at the trial, by evidence offered by the defendant, that the copyright was in a stranger, and not, to require that the latter should, in all cases, give notice of facts with which his opponent was better acquainted than himself. The 16th section provides, that in the event of the defendant not giving the particulars therein mentioned, he "shall not at the trial" "be allowed to give any evidence that the plaintiff" was not the proprietor of the copyright. Here the defendant did not give, or offer to give, any evidence on the subject; the objection arose upon the evidence adduced by the plaintiffs, and it is submitted that there is nothing in the act to preclude him from taking it. [Maule, J.—It may be that Horn's interest in the copyright was not known to the plaintiffs. They may not have been told that he had composed the accompaniment]. [He also urged the other objections which were taken at the trial.]

LEADER and Another P. Purday.

Coltman, J., after deciding that Bellamy had originally the copyright in the whole composition, said,—The second point made by the defendant is, that it was necessary that the plaintiffs should prove an assignment by Horn of the accompaniment of the song; but I am of opinion that it was not competent for the defendant to raise that objection under the notice of objections which he delivered. The 5 & 6 Vict. c. 45, s. 16, is express upon the point. It requires that a defendant who intends to set up the defence that another person is the proprietor of the copyright, shall specify, in his notice of objections, the name of the person in whom he alleges the copyright to be. [The learned Judge also held that Bellamy's title was transferred by the deed of 1845, and not by the agreement of October, 1844.]

MAULE, J., and WILLIAMS, J., concurred.

Rule discharged.

1848.

A provisional

BLANDY v. DE BURGH.

committee, of which defendant was an active member, was formed in August, 1845, to establish a railway company. An office was taken for the business of the comany in M. Street, and registered in November. 1845, and a brass plate was affixed to the door with the title of the company engraved on it. The scheme was abandoned on the 5th of January, 1846, from which time the defendant ceased to attend at the office, or to intermeddle

with the affairs

sub-committee, composed of

other persons

was appointed to wind up the

company. On the 28th of

affairs of the

September,

bers of the

provisional committee.

of the company; but a DEBT for work and labour, and for money paid.

Plea, that the action was brought upon an attorney's bill, and that the plaintiff did not deliver to defendant, or leave at his counting-house, office of business, dwelling-house, or last known place of abode, a signed bill a month before the action was brought.

Replication, that the plaintiff did, one month before, &c., leave for the defendant at his office of business a signed bill. Issue thereon.

Upon the trial before Wilde, C. J., at the sittings in London after Trinity Term, 1847, the following facts were proved: The defendant was chairman of the managing committee of a provisionally registered joint stock company, called the Oxford, Thame, High Wycombe and Uxbridge Railway Company, which was formed in August, 1845. The office of the company was at No. 43, Moorgate Street, in the city of London, and was duly registered in the month of November in the same year, under the 4th section of the 7 & 8 Vict. c. 110, and several meetings were held at the office, which the defendant attended. Shares were allotted to a number of persons who had applied for them, but as none of those persons paid their deposits on the 5th of January, 1846, the day appointed for that purpose, the project was on that day abandoned, and the company ceased, practically, to exist, or, in the language of one of the witnesses, died a natural death. The plaintiff had acted as the solicitor and local agent of the company, and his present demand was for work done in that character. The secretary of the company wrote to him

1846, the plaintiff, a local attorney, employed by the provisional committee, left his bill in the hands of a clerk at the office in M. Street, upon the door of which the brass plate continued fixed. The bill was headed and directed to the provisional committee.

Quære, whether such a delivery was a delivery to the defendant "at his place of business?" Semble, per Wilde, C. J., and Williams, J., that it was not; and per Coliman, J., and Maule, J., that it was.

on the 9th of March, 1846, from the office in Moorgate Street, stating that he was instructed by a sub-committee, appointed by the company for the purpose of considering the claims on the company, to offer him a hundred guineas in full discharge of his demand. This offer the plaintiff rejected, and on the 28th of September, in the same year, he delivered his bill of costs at the office in Moorgate Street, to a person who had the appearance of a clerk. The door bore, at that time, a brass plate, which had been affixed to it when the office was taken for the use of the company, and on which the title of the company was engraved. The bill was headed "The Provisional Committee of the Oxford, Thame, High Wycombe and Uxbridge Junction Railway Company, to William Blandy," and was inclosed in an envelope, directed to the company by the same title.

Upon this evidence, it was objected that the plaintiff must be nonsuited, as there was no proof of the bill having been delivered to the defendant at his office of business. The learned Judge declined to nonsuit the plaintiff, and the jury found a verdict for him, damages 200L, the amount claimed, subject to taxation. Leave was reserved to the defendant to move to set aside the verdict, and have it entered for him, or for a nonsuit.

M. Chambers having, in Michaelmas Term, 1847, obtained a rule nisi accordingly,

Byles, Serjt., and Phipson, shewed cause. The question is, whether the delivery of the bill at the company's office is a delivery to the defendant "at his office of business" within the meaning of the 37th section of the 6 & 7 Vict. c. 73. It is clear that if there was a delivery to the company there was a delivery to every member of the company, and consequently to the defendant. In Edwards v. Lawless (a), a delivery to one member of a provisional

(a) Ante, p. 105; S. C. 6 C. B. 329.

BLANDY

B.

DE BURGH.

BLANDY

B.

DE BURGH.

committee of an attorney's bill, addressed to the committee generally, was held no delivery to another member; but the delivery in that case was made, not at the company's office, but at the private place of business of the committeeman; and Wilde, C. J., in giving judgment, said the bill ought to have been delivered either at the office of the company, or at least to some person who can be reasonably considered as representing the company (a). In the present case it was established by the evidence, that a bill, charging all the members of the provisional committee, was delivered by the plaintiff at the company's office in Moorgate Street, on the 28th of September, 1846. That place was registered in 1845 as the company's office, under the 7 & 8 Vict. c. 110, s. 4; and as no change of address appears to have been, at any subsequent time, returned to the registrar, as required by the same section of the act in case of a change of place, it must be taken to have been the company's office when the plaintiff's bill was delivered there. It will be said on the other side, as it was upon the trial, that the company had "died a natural death" in January, 1846, and that the office in Moorgate Street could not, therefore, be the office of the company. But the letter of the secretary to the plaintiff shews that the company was subsisting at a later date, and, in the absence of any evidence to shew that its affairs were wound up and that it was dissolved, it will be presumed to be still in existence. The brass plate which was on the door of the office when the bill was left there, is evidence, against a member of the company, that it was at that time a subsisting company, and that the office was their office, for the place was thereby held out to the world as the company's office. [Best on Presumptions (b); Starkie on Evidence (c); Taylor on Evidence (d), were referred to. In Clark v. Alexander (e), a partnership which was admitted to have been in existence in 1816, was presumed, in the

⁽a) Ante, p. 108.

⁽d) Vol. 1, p. 125.

⁽b) Page 186.

⁽c) Vol. 3, p. 937, 3rd ed.

⁽e) 8 Scott, N. R. 147.

absence of evidence to the contrary, to be continuing in 1838.

BLANDY

BLANDY

DE BURGH.

Montagu Chambers and Maynard, in support of the rule. The question is not whether there has been a delivery of the bill at the office of the company, but whether the delivery of the bill at the office in Moorgate Street was a delivery to the defendant at his office of business. defendant is sought to be charged in his individual capacity, and he was entitled, therefore, to have the bill delivered at his residence, or at his own private place of business. is now well established that these joint stock companies are not ordinary partnerships, and that its members, therefore, do not stand towards each other in the relation of partners. Edwards v. Lawless (a) shews this; for if the members of such companies be partners, the delivery of the bill, in that case, would have been deemed sufficient. A delivery to one member, then, is not a delivery to all the other members; and, it is submitted, that the delivery at the office of a company is not a delivery to any member of the company individually, and consequently, that in this case there has been no delivery to the defendant. If such a delivery were held sufficient, it would follow that it would be a good delivery to every shareholder in the company; nay, further, that a delivery by the defendant's private solicitor of his bill at the office of any company of which the defendant happened to be a member, would be a sufficient delivery to the defendant. But, further, in this case, the bill was not even directed to the defendant, but only to the provisional committee generally, and the plaintiff must therefore fail, for non-compliance with the provisions of the act requiring that an attorney's bill shall be left with "the party to be charged therewith." If the plaintiff had, in delivering the bill at the office, intended that such delivery should be a delivery to the defendant, he would have directed it to the defendant, or at least stated, in the BLANDY

o.

DE BURGH.

direction, that he was sought to be charged. The object of the statute in requiring a signed bill to be delivered to the client was to protect him against being sued before he had notice of the claim made upon him. The act of 2 Geo. 2, c. 23, required that the bill should be delivered to the party sought to be charged, or should be left at his dwellinghouse or last place of abode. The recent statute of the 6 & 7 Vict. c. 73, has indeed extended this provision, by making a delivery at the counting-house or office of business sufficient; but the object of the legislature, in both acts, was to ensure, as far as possible, that the bill should reach the hands of the person sought to be charged. this test, the delivery in this case was not a delivery to the defendant. Was it probable, and will it be presumed upon the evidence, that the bill ever actually came to the defendant's hands? The office in Moorgate Street was not his place of business, and it was not probable that he went there in the month of September to attend to the concerns of a company which, whatever presumption the brass plate on the door may have raised to the contrary, was clearly proved to have been defunct many months before. Eggington v. Cumberledge (a) was referred to, and distinguished from the present case.

WILDE, C. J.—I am of opinion that this rule ought to be made absolute. The question involved is of much more importance than the mere sum in dispute; for it is of the greatest importance to determine what shall be deemed "the counting-house or office of business" of an individual, who is a member of the committee of a company such as this; especially as the rights of parties are materially affected, in the case of an attorney's bill, by the time at which it has been delivered. The question is, whether the bill in this case was left for the defendant, at his "office of business," within the meaning of the 6 & 7 Vict. c. 73, s. 37. That statute has gone a great way to relieve attorneys from many

difficulties to which they were formerly exposed as to the delivery of their bills of costs, by giving them the choice of several places of delivery. They may now choose for that purpose, either "the counting-house, office of business, dwelling-house, or last known place of abode" of the party sought to be charged. Now, the defendant in this case is sought to be charged with the amount of this bill, not by reason of any interest or shares which he may have in the company; but as having been the chairman of its managing committee, and as having, in that character, either expressly or impliedly, authorized the committee to pledge his credit by entering into the contract upon which the plaintiff now The bill of costs appears to have been incurred in preparations for going to Parliament, and the jury no doubt considered that the defendant had made himself personally liable as a contracting party, as they found a verdict against him. Being so liable, then, the question is, whether the bill upon which this action is brought was delivered at his office of business. Now, what evidence was there to shew that the office in Moorgate Street was his office? It is said that he was a member of a committee formed for the purpose of carrying into effect a railway scheme, and that he attended several meetings at that place, which was the company's office of business, from time to time, until the 5th of January, 1846. Upon that day the deposits were to be paid, and it was then to be seen whether a company would be formed or not. The deposits not having been paid upon that day, the company, as was aptly said by one of the witnesses, died a natural death. What, then, was the relation of the parties? What privity was there between the members of the committee? It appears to me, none The old association was at an end; any member of it was at liberty to withdraw; and there was no evidence that the defendant, at any time afterwards, acted, or appeared, at the office of the company. After this, a sub-committee was appointed by the entire body of shareholders, for the purpose of going into the accounts and winding up the D. & L. VOL. VI. EE

BLANDY

b.

DE BURGH.

BLANDY

B.

DE BURGH.

affairs of the company. The old committee had ceased to exist; its members were not members of the sub-committee, and there was no privity between the members of the two In a word, the project was abandoned as abortive in the beginning of 1846, and from that time the defendant appears no more upon the scene. The question then is, whether, under these circumstances, the office in Moorgate Street was, in September, 1846, the office of business of the defendant. It seems to me that it ceased to be his office of business, when the business of the company ceased to be carried on there. It was not probable that a bill left there in September, addressed to the provisional committee, would ever come to the defendant's hands; indeed, for that purpose, it might as well have been delivered at the office of any other company. It appears, however, that on the 9th of March, a gentleman, not shewn to have been in any way connected with the defendant, or to have been authorized by him, writes a letter, headed with the name of the company, and dated from the office in Moorgate Street, stating that he was instructed to offer the plaintiff a sum of money in discharge of his demand. But how is the defendant affected by that? There is no proof that it was written by his authority. Then, it appears, that a brass plate, with the name of the company engraved on it, was put upon the door of the office in 1845, and had not been taken down in September, 1846. But whose duty was it to take it down? Was it the defendant's? I am not aware that it was the duty of any individual to do so. Reference was made in the course of the argument to the fourth section of the Joint Stock Companies' Registration Act, which requires that every change in the place of business of a company shall be registered; but suppose there be no change of the place of business; suppose that the company is altogether at an end; the act does not require that the cessation from business shall be registered, or any statement that the office, which was once the office of the company, has ceased to be so. It was also said that there had been

a holding out to the public, by the defendant, that the office in Moorgate Street was the place of business of the company of which he was a member, and that the defendant was, in consequence of such holding out, estopped from denying that the place was his office. I can see no estoppel He never held out that it was his place of in the case. The question simply is, whether, on the 28th of September, 1846, this place was the defendant's place of The office was his place of business at one time, viz., at the time when he was associated with other persons for the purpose of forming a company, and when the business of that company was transacted there; but, as he was not shewn to be in any way connected with the sub-committee, which was formed at a later period to wind up the affairs of the company, it seems to me that the office ceased to be his place of business for any purpose, or in any sense, from the time when the company abandoned their project. I think that the act of 6 & 7 Vict. c. 73, although partly intended to relieve attorneys and solicitors as to the delivery of their bills, was also intended to secure that the bill should come to the hands of the lay suitor; and I think that that object was not attained in this case. I am, therefore, of opinion that the rule for entering a nonsuit ought to be made absolute.

COLTMAN, J.—I regret that I am unable to yield my assent to the opinion just expressed of the Lord Chief Justice. The question is, whether there has been a delivery of the bill at the "office of business" of the party sought "to be charged therewith." Now, the persons sought to be charged were the members of the provisional committee of the Oxford, Thame, High Wycombe and Uxbridge Junction Railway Company, of which committee it appears the defendant was a member. The bill was delivered on the 28th September, 1846, at an office which, it was contended, was the office of the provisional committee; and the ques-

BLANDY

b.

DE BURGH.

BLANDY

b.

DE BURGH.

tion for the consideration of the Court is, whether that place was "the office of business" of the party sought to be "charged" in this action. The charge against Mr. De Burgh is not made against him for business done in his private capacity; but for business done for a provisional committee, of which he was a member, and in respect of which business all the members were charged by the bill. It appears that the committee was established to form a railway company, which proved abortive in January, 1846, and there is no evidence that the defendant attended at the office in Moorgate Street after that time. But, it must be borne in mind, that although the scheme proved abortive, the duties of the persons who had set it on foot did not cease thereupon; but that it was their duty, among other things, to see that the debts which had been contracted were discharged. It was not competent for them, upon the failure of the scheme, to withdraw from the concern, until the debts had been paid; and, therefore, I do not think that the "business" of the company was concluded when the bill was delivered. 6 & 7 Vict. c. 73, s. 37, makes a delivery of an attorney's bill at "the office of business" of the party "to be charged therewith" a sufficient delivery; and the 4th section of the 7 & 8 Vict. c. 110, requires, among other things, a return of the name of the street in which the place of business of the company is situated, and the number of the house, " and afterwards, from time to time, until the complete registration of such company, a return of a copy of every addition to, or change made in any of the above particulars." I think that until this provision was complied with, the place which appeared on the register continued, to all intents and purposes, "the office of business" of the company; and that it was not competent for the defendant to repudiate it as his office of business. I therefore think that a delivery of the bill at the office in Moorgate Street was a delivery to the defendant "at his office of business," and that the rule for a nonsuit should be discharged.

MAULE, J.—I am also of opinion that this rule should be discharged, and my regret at being obliged to differ in opinion from the Lord Chief Justice is diminished by the reflection that in the conclusion to which I have come. I have the good fortune to agree with my Brother Coltman. I think that the plaintiff's bill was delivered at "the office of business" of the defendant. The defendant is sought to be charged as one of the provisional committee of an intended railway company, of which committee he had unquestionably been a member. The bill was headed and directed to the provisional committee of the company, and was left at the place of business of the company. not shewn that the company had changed their place of business, or carried on any other business anywhere else; but it did appear that the name of the company, on a brass plate, continued on the door of the office; and that seemed a continuing declaration by the company, that the place was the office where they carried on their business. was said about the scheme having been abandoned, it is, no doubt, very probable that the committeemen were very willing, like most people, to abandon their liabilities when the project turned out unprofitable. But their business did not consist simply in pocketing profits; an important part of it—and the most important part, too, as regards those who dealt with them—was to pay their debts; and that part of the business they could not abandon. It was as necessary for the company to have an office for paying their debts, as it was for receiving deposits; and it must be presumed, from the fact of the brass plate being suffered to remain on the door, that the committee continued to have that office as their place of business for the payment of their debts, so long as any remained unpaid, although they had abandoned the prosecution of their scheme. I think, therefore, that there is very good ground for saying that the place at which the bill was delivered, was "the office of business" of the provisional committee at the time it was

BLANDY
v.
DE BURGH.

BLANDY
v.
De Burgel

delivered. And I think that the delivery of the bill at that place was a sufficient delivery to the defendant. plaintiff delivered his bill, as suggested, at the defendant's place of abode, he would have then elected which of the members of the committee he intended to sue. was not bound so to elect; he had a right to charge all or any of the members; and, for the purpose of serving them all, he might very well deliver his bill at the place where the committee met to carry on their business. was not bound to serve each of them individually. said that the defendant had not an opportunity of knowing that he was sought to be charged by this bill; but if he was ignorant of the fact, it was his own fault. He knew very well, that although the scheme was abandoned, there were outstanding demands against the committee; and if he wished to know what those demands were, he ought to have gone to Moorgate Street, and inquired. I do not think that a person can acquire any right or immunity from an ignorance which is caused by his own neglect.

WILLIAMS, J.—I agree with the Lord Chief Justice in thinking that the rule for a nonsuit ought to be made absolute. The question is, whether the delivery of this bill at the house in Moorgate Street was a delivery at "the office of business" of the defendant within the meaning of the 6 & 7 Vict. c. 73, s. 37, and I am of opinion that it was not. I conceive that the term "office of business," in that section, means the place where a person actually carries on business, either by himself or by his agent; and I do not think that the defendant can be properly said to have been carrying on business at the office in Moorgate Street, at the time when the bill was delivered there. project had been long before abandoned; the whole business of the company was at an end as early as the preceding month of January, and although it is true that the liabilities of the committee did not therefore cease, yet the office

ceased to be the place of business of the company. It does not appear that the defendant afterwards concurred in making the office a place of business for winding up the affairs of the company, or gave any authority to that being done; and, therefore, I do not think it was his "office of business" at the time the bill was delivered there.

BLANDY

DE BURGH.

WILDE, C. J.—As the Court is equally divided, the rule falls to the ground.

No rule.

COURT OF EXCHEQUER.

Bilary Cerm.

IN THE TWELFTH YEAR OF THE REIGN OF VICTORIA.

1849.

HALIFAX and Others v. LYLE.

To an action of assumpait on a bill drawn by the Governor and Comthe plaintiffs, and accepted by the defendant; the defendant pleaded, among other pleas,

Fourthly, that the said Governor and Company of Copper Miners were a body corporate; that the said bill was made by their cor-

A SSUMPSIT. The first count stated that the Governor and Company of Copper Miners in England, on the 15th July, A.D. 1847, made their bill of exchange, in writing, pany of Copper and directed the same to the defendant, and thereby re-miners, and indorsed to quired the defendant to pay to the order of the said Governor and Company of Copper Miners in England, 2000L, twelve months after the date thereof, which period had elapsed before the commencement of this suit, and the defendant then accepted the said bill, and the said Governor and Company of Copper Miners in England then indorsed the same to the plaintiffs, and the defendant then promised the plaintiffs to pay them the amount of the said bill, according to the tenor and effect thereof, and of the said acceptance and indorsement. Breach, non-payment.

porate name and style, and that it was indorsed by writing and signing, and not under the

common seal of the said body, nor by any person having authority to do so.

Fifthly, that the Governor and Company of the Copper Miners were a body corporate; that the bill was made by them as such, and that they had no authority to indorse bills.

Held, on special demurrer, that the fourth plea was bad, as amounting to an argumentative denial of the indorsement; and that the fifth plea was also bad, on the ground that the acceptor of a bill, payable to the order of another, cannot be permitted to deny the authority of that person to indorse.



Fourth plea, that the said Governor and Company of the Copper Miners in England, by whom the said bill is alleged to have been so made as in the first count mentioned, before and at the respective times of the making and indorsing of the said bill of exchange, were, and from thence hitherto have been, and still are a body corporate in name and in deed, made, created, constituted, and appointed by and under the name and style of the Governor and Company of the Copper Miners in England, under and by virtue of certain letters patent of their late Majesties, William and Mary, &c.; and that the said bill of exchange was made as in the said first count mentioned, by and under the corporate name and style, and as and for a bill made by the said body corporate. And the defendant saith, that the said bill of exchange was so indorsed as in the said first count mentioned, by writing and signing on the back of the said bill respectively, and not by or under the common seal of the said body corporate, nor by any person or persons having authority of or from the said corporate body to indorse the same for, or in the name, or on the behalf of the said body corporate. Verification.

Fifth plea, that the said Governor and Company of the Copper Miners in England, and by whom the said bill is alleged to have been made as in the said first count mentioned, before and at the time of the making and indorsing of the said bill of exchange, respectively were, and from thence hitherto have been, and still are a body politic and corporate in name and in deed, made, created, constituted, and incorporated by and under the name and style of the Governor and Company of the Copper Miners in England, under and by virtue of certain letters patent of their late Majesties, William and Mary. And the defendant further says, that the said bill of exchange purported to be, and was a bill made and drawn by the said body corporate, and was accepted by him (the defendant) as a bill so made and drawn by the said body corporate, and not otherwise; and that the said body corporate had not at the time of the said

HALIFAX and Others v. Lyle.

HALIFAX and Others

indorsement, or at any time whatever, authority to indorse any bill or bills of exchange, or to issue or negotiate any such bill or bills, or to pass or transfer the right to receive payment of such bill or bills by an indorsement thereof, in the name or under the designation of the said Governor and Company of the Copper Miners in England, or otherwise, &c. Verification.

Special demurrer to the fourth plea, on the ground that it amounted to an argumentative denial of the indorsement.

Special demurrer to the fifth plea, assigning for causes that it was an argumentative denial of the indorsement of the bill alleged in the declaration; that it attempted to put in issue matter which the defendant was estopped from denying, viz., that the Governor and Company of Copper Miners had authority to indorse the bill as alleged in the declaration; that it appeared on the face of the declaration that the bill was payable to the order of the said drawers thereof, and therefore that the defendant could not deny the authority of the drawers of the bill to indorse it as in the declaration mentioned; that the plea left it doubtful whether the defendant meant to deny that the Governor and Company of Copper Miners ever had authority to indorse, &c., bills, or whether their authority to indorse, &c., bills expired or determined after the accepting of the bill; and if the latter, that the plea should have shewn how and in what way such power or authority ceased or was determined; that the plea attempted to put in issue, and did put in issue matter of law; that the plea was bad for stating that the drawers had not authority to indorse any bill of exchange, instead of shewing how or why, or facts from which the Court could judge whether such drawers of the bill had such power or not; that the plea should have shewn that the drawers of the bill were not a trading corporation at the time of the indorsement of Joinder in demurrer. the bill.

The points stated for argument, on the part of the defendant, were, that the fourth plea admitted an indorsement

in fact by writing on the back of the bill, but avoided the effect of it by shewing that such indorsement could not transfer the right to sue upon the bill, for that a corporate body cannot, unless specially authorized by act of Parliament, transfer any property or right except by or under its common seal, and if there were any such special authority enabling them to do so, the plaintiffs should have shewn it by their replication; that the fifth plea was a sufficient answer, because the doctrine that an acceptor is estopped from denying that the bill is the bill of the supposed maker, does not apply to an indorsement of the bill by the maker, inasmuch as the estoppel rests on the ground that the bill was accepted after it was made, and with full knowledge by the acceptor of the manner of making it, whereas the indorsement may be subsequent to the acceptance, and consequently not admitted by it; also that the objection was not an objection of fact, which could be met by an estoppel, but an objection of law, arising out of the fact that the company was a corporate body, and not authorized to indorse bills.

HALIFAX and Others

Prentice, in support of the demurrer. The fourth plea is bad. It states that the drawers were a body corporate, and that the bill was indorsed by persons who had received no proper authority from them so to do. It therefore amounts to an argumentative traverse of the indorsement. The fifth plea is also bad. An acceptor is estopped by his acceptance of a bill, payable to the order of another, from denying the right of that person to indorse it; Pitt v. Chappelow (a); Sanderson v. Collman (b). It may be contended on the other side, that the estoppel should have been replied, but it is submitted that the question can be raised by demurrer. Here the estoppel is apparent on the face of the record, and the plaintiff is therefore entitled to demur; note to Veale v. Warner, 1 Saund. 326, n. (4); Hill v. Manchester and Sal-

⁽a) 8 M. & W. 616.

⁽b) 4 M. & G. 209; S. C. 4 Scott, N. R. 638.

HALIFAX and Others

ford Water Works (a); Bosoman v. Taylor (b); Smith's Leading Cases, vol. 2, p. 457. The plea also amounts to an argumentative denial of the indorsement; Marston v. Allen (c). It appears on the face of the declaration that, at the time of drawing the bill, the drawers had power to indorse. It should have been shewn in the plea, therefore, how that authority had been determined.

C. Blackburn, in support of the pleas. It must be conceded that the fourth plea cannot be sustained. The fifth plea, however, is good. It does not appear that there is any estoppel on the face of the pleadings; and if any facts existed which would have amounted to an estoppel, they should have been pleaded by way of replication. The mere fact of acceptance is not sufficient to preclude the acceptor from disputing the right of the drawers to indorse. The declaration would have been supported at the trial by proof of acceptance before drawing. [Parke, B.—No doubt you may prove an acceptance either before or after the drawing; Molloy v. Delves (d)]. It is only where the acceptance has been given with full knowledge of the incapacity of the parties to transfer the instrument, that the acceptor is estopped; Beeman v. Duck (e). To support their title, the plaintiffs should have replied that they took the bill upon the faith of the acceptance. The decision in Pitt v. Chappelow (f) is no authority against the defendant. power to draw does not necessarily involve the power to indorse; Robinson v. Yarrow(g). Neither does the plea amount to an argumentative denial of the indorsement. It admits the indorsement, but disputes its legality. Matter, by which a contract is rendered either void or voidable, must be specially pleaded. The case comes within the

principle established in Alcock v. Alcock (a), where it was holden that the maker of a promissory note, sued by an indorsee, might plead that the indorser was a lunatic at the period of the indorsement. As to the objection that the plea should have shewn that the company had no authority to indorse; primâ facie, a corporation has no power to indorse; East London Water Works Company v. Bailey (b); Bayley on Bills. The burthen, therefore, was on the plaintiff to reply matter, shewing that the company, being a corporation, had such power.

HALIPAX and Others

Prentice replied.

Cur. adv. vult.

PARKE, B., now delivered the judgment of the Court (c). His Lordship, after stating the pleadings, proceeded as follows:-We think our judgment in this case must be for the plaintiffs. On the argument the learned counsel for the defendant very properly gave up the fourth plea, and admitted the judgment of the Court must be against him on that plea. He argued very ably in support of the fifth, but we think that that also is bad, on the ground that the acceptor of a bill, payable to the order of the drawer, cannot deny the authority of the drawer to draw and indorse. The case of Sanderson v. Collman (d), was relied upon on the part of the defendant. That case shews an estoppel in pais may be replied—it does not follow it must. Brother Cresnoell gave his opinion that the plea in that case was bad, because it set up as a defence what, if true, would be no answer to the action; and we think that that opinion is correct. The law is well settled by that and former cases, (I may mention Taylor v. Croker (e),) that the acceptor of a bill, or maker of a note, payable to the order

⁽a) 3 M. & G. 268. Term.

⁽b) 4 Bing. 283; S. C. 12 (d) 4 Scott, N. R. 638. Moore, 532. (e) 4 Esp. 187.

⁽c) In the Vacation after Hilary

HALIFAX and Others 9.

of another, cannot be permitted to deny the authority of that person to indorse. It is, in truth, a contract with that other person primâ facie for valuable consideration to pay to his order, and which is transferable by the law merchant. That contract he is bound to perform, as he is all other valid contracts; and if for the want of such a consideration it be not a binding contract, he must shew it by an affirmative allegation. If the fact be that he accepted a bill, or made a note, leaving a blank for the payee's name, and the name was filled in afterwards, without his authority, he ought to have denied the acceptance of the bill or the making the note. On this plea, it must be assumed this acceptance was put on this bill after it was drawn; or that if it was accepted with the name of the drawer and payee in blank, the name was afterwards filled up by the defendant's authority. being so, and the plaintiffs being assumed to be holders for valuable consideration, and bonâ fide, the contrary not being pleaded; what is termed an estoppel appears on the declaration, and the plea is therefore bad. There is stated on the face of the pleading a valid contract, and binding by the law merchant on the defendant to pay to the indorsee of the corporation. There must, therefore, be judgment for the plaintiffs.

Judgment for the Plaintiffs.

BURMESTER P. O. v. CROPTON.

To an action on a sci. fa. to have execution against a member for the time being of a banking copartnership, under 7 Geo. 4, c. 14, s. 13,

A DECLARATION in scire facias, by F. Burmester, as public officer of the London and Westminster Bank, against one of the members for the time being of the North of England Joint Stock Banking Company, against the public officer of which, he had recovered judgment for 53,950L

the defendant pleaded that the plaintiff had, before issuing the present writ, issued another writ of sci. fa., and obtained an award of execution against one J. A., another member for the time being of the same copartnership: *Held* bad, on demurrer.

The defendant pleaded that he and one J. Aitchison, at the time of the judgment and up to the issuing of the scire facias, were members of the last mentioned copartnership, and jointly liable to have execution against them upon the said judgment; that before the issuing of the writ of sci. fa. in the declaration mentioned, the plaintiff issued another writ of sci. fa. against J. Aitchison, and by the judgment of the Court it was considered that the plaintiff should have execution against the said Aitchison of the damages. Verification.

BURMESTER v. CROPTON.

Demurrer, assigning, among other causes, that the statute gave the right of execution against the member for the time being of such copartnerships as those of which the defendant was a member, irrespective of any judgment having been previously obtained in sci. fa. against other members of such copartnerships. Joinder in demurrer.

Willes, in support of the demurrer. The plea is bad. It will be contended on the other side, that if a party has obtained judgment against one member for the time being of a banking copartnership, he cannot proceed against any other member. That argument, however, is untenable. The plaintiff is bound to obtain judgment against the members of one class, namely, those who are members for the time being, before he proceeds against those of another By the 7 Geo. 4, c. 46, s. 13, it is provided, that execution upon any judgment obtained against the registered officer of a banking copartnership, may be issued against the members "for the time being" of such copartnership, and in the event of its proving insufficient, then against those individuals who were members at the time when the contract, upon which judgment had been obtained, was entered into, &c. King v. Hoare (a) may possibly be relied on, but that case is not applicable, since there the debtors were joint. In Fowler v. Rickerby (b) it was decided, that in proceedings under 7 Geo. 4, c. 46, against certain

⁽a) 13 M. & W. 494; S. C. ante, vol. 2, p. 382.

⁽b) 2 M. & G. 760; S. C. 9 Dowl. 682; 3 Scott. N. R. 138.

1849.
BURMESTER
v.
CROPTON.

members of a banking copartnership, the non joinder of others could not be pleaded in abatement. [He was then stopped by the Court, who called on]

Manisty, to support the plea. A concurrent writ of sci. fa. cannot issue against another member of the same class. The object of the Legislature in granting the remedy pointed out in the 13th section was, that certain parties should be selected against whom to proceed, and not that one execution should be split up into several executions. In Esdaile v. Lund (a), although the case was decided on another point, it appeared doubtful whether the plaintiff could issue several separate writs of sci. fa. against different members. If this species of execution were allowed, the 7 Geo. 4, c. 46, would become ineffectual. If a sci. fa. is to be regarded as a judicial writ, it should include all parties. [He referred to Dodgson v. Scott (b); Lilly's Pract. Reg. 497.]

Willes was not called upon to reply.

POLLOCK, C. B.—I am of opinion that the plaintiff is entitled to our judgment. If any oppression were attempted, the case might be different. All we are now called upon to do is to construe this act of Parliament. If the question were new, I should be disposed to form the same opinion as that which I now entertain. We are bound by the authorities which have been brought before us.

PARKE, B.—This is not a question to be decided by the principles of the common law, but depends on the mode of carrying into effect the 7 Geo. 4, c. 46, s. 13. The intention of the Legislature was to enable the creditor, by suing one or more members, to recover his debt. But if the interpretation proposed by the defendant be adopted, that object would not be attained; for, according to his construction, if the plaintiff has failed in his attempt to obtain payment

⁽a) 12 M. & W. 607; S. C. ante, vol. 1, p. 565.

⁽b) Ante, p. 27; S. C. 2 Exch. 457.

by reason of the insolvency of the party against whom he proceeds, he cannot subsequently proceed against another member of the same class; and until that class is exhausted, he has no remedy against those belonging to the second. It is difficult to construe an act of Parliament which seems to have been drawn by a person not very well acquainted with the rules of the common law. It is, however, clear, that it was contemplated that every member of the first class should be liable for the debt. If a plaintiff were to issue a number of writs in a vexatious manner, the Court would, in all probability, interfere to prevent the abuse. The present plea certainly affords no answer to the action.

1849. BURMESTER CROPTON.

ALDERSON, B., and PLATT, B., concurred.

Judgment for the Plaintiff.

WILLIAMS v. MILES.

DEBT by the payee against the maker of a promissory note.

Second plea, that heretofore and before the commencement of this suit, to wit, &c., the defendant was appointed made by the and then became, and was the treasurer of and to a certain society consisting, and which then consisted and was composed of divers persons, to wit, fifty persons, and was called sisted of divers the Silurian Lodge of the Independent Order of Odd Fellows, Manchester Unity, Maesteg District, and that the business and duty of the defendant as such treasurer as aforesaid, was to receive and pay money for and on account Held, on speof the said society, and that the defendant did accordingly, and whilst he was such treasurer as aforesaid, after the not stating

Debt against the maker of a promissory note. Plea, that it was treasurer of a certain society, which conersons, to wit, fifty persons, and was called The Silurian Lodge of Odd cial demurrer, that the plea was bad, for the names of the persons

who composed the society, or alleging a reason for the omission.

WILLIAMS

V.

MILES,

making of the said note in the declaration mentioned, and before the commencement of this suit, to wit, &c., receive and pay divers sums of money for and on account of the society. And the defendant further saith, that he the defendant, before the commencement of the suit, to wit, &c., made and delivered to the plaintiff the said promissory note in the declaration mentioned, as a security for the payment by the defendant of any sum or sums of money which should or might be due or owing to the said society from the defendant, as such treasurer as aforesaid, upon a just and proper balance of the account between the defendant as such treasurer as aforesaid, and the said society. plea then proceeded to aver that the note was given for no other purpose; that no sum of money was due from the defendant to the society; that there was never any other consideration for the note, and that except as aforesaid, the plaintiff held the note without any value or consideration. Verification.

Special demurrer, assigning for cause that it mentioned divers, to wit, fifty persons, without giving either their Christian or surnames, or offering any excuse whatever for their omission; and that if their names were unknown to the defendant, the fact should have been stated in the plea.

Unthank, in support of the demurrer. The plea is bad, for the grounds stated. This Court has already held that the omission of the Christian name in pleading is fatal, unless excused by averment; Appelmans v. Blanche (a). The omission of the Christian and surnames altogether, therefore, à fortiori, is ground of demurrer; Levy v. Webb (b); Gatty v. Field (c); Ball v. Gordon (d); Tigar v. Gordon (e); Esdaile v. Maclean (f).

```
(a) 14 M. & W. 154.
(b) 9 Q. B. 427.
(c) Ibid. 431.
(d) 9 M. & W. 345; S. C. 1

Dowl. 656, N. S.
(e) 9 M. & W. 347; S. C. 1

Dowl. 892, N. S.
(f) 15 M. & W. 277.
```

Prentice, in support of the plea. Unless the present plea be holden to be good, the defendant would have no defence, as the names of the parties are to him unknown. It is only recently that it has been considered that the names of the parties should be given at full length. There is nothing to shew that the society mentioned are not a corporate body, and are described by their corporate name. [Parke, B.—If that allegation had been traversed, would you have been compelled to prove that they were a corporation?] No. [Parke, B.—Then there must be something new to shew that fact.]

WILLIAMS v. MILES.

Unthank referred to the case of Russell v. The Men of Devon (a).

PARKE, B.—The plea is bad. In Rove v. Roach (b) it was decided, that a plea of justification to an action for slander of plaintiff's title to certain copper mines, which stated that the adventurers or persons having an interest or share in the said mines, thought it their duty to caution persons against purchasing the ore, &c., was bad; for not disclosing the names of the adventurers, or who they were. Here, therefore, the names of the persons who composed the Silurian Lodge should either have been stated, or some excuse have been alleged, for the omission; such as that it was so numerous and fluctuating a body, that it was impossible to ascertain who all the members were.

ROLFE, B., and PLATT, B., concurred.

Leave to Defendant to amend, otherwise judgment for Plaintiff.

(a) 2 T. R. 667.

(b) 1 M. & S. 304.

1849.

STILWELL v. CLARKE.

Where a plaintiff bas been taken in execution for the costs of a former action. but has subsequently been discharged upon her own petition under the Insolvent Debtors' Act, the Court will direct the proceedings in the second action to be staved, until the costs of the former, are paid.

TALFOURD, Serjt., had obtained a rule calling upon the plaintiff to shew cause why all proceedings in this cause should not be stayed, until the costs of a former action had been paid by the plaintiff to the defendant.

The affidavits stated that the former action had been referred to arbitration, and that the plaintiff having refused to obey the award of the arbitrator, an attachment was granted against her, under which she had been imprisoned for six months. She was subsequently taken in execution for the costs under the award. Upon her petition she was afterwards discharged by an order of the Insolvent Debtors' Court.

Lush shewed cause. The plaintiff having been taken in execution for the costs of the former action, it operated as a discharge of those costs; Beaven v. Robins (a). is it affected by the fact that the plaintiff was discharged under the Insolvent Debtors' Act. It is not. In the case of Doe d. Heighley v. Harland (b), the Court of Queen's Bench indeed stayed the proceedings until the costs of a former action were paid by the lessor of the plaintiff, although he had been discharged as an insolvent while in But that was the case of an attachment, which the Court in their judgment stated to be no satisfaction, and was unlike the case of a person taking his debtor under The case of Doe d. Standish v. Roe(c) may be cited as an authority for the other side, but it does not appear, in that case, that the lessor of the plaintiff in the first action had been taken in execution at all.

(c) 5 B. & Ad. 878; S. C. 2 N.

⁽a) 8 D. & R. 42.

^{. &}amp; E. 761. & M. 468.

⁽b) 10 A. & E. 761.

Pollock, C. B.—This is an application to the discretion of the Court; and we are disposed to exercise it, unless you could shew us some authority to the contrary.

1849. STILWELL CLARKE.

PARKE, B.—The present case is distinguishable from the general rule, and from the case first cited. debtor, by applying to the Insolvent Debtors' Court, has, by her own act, put an end to the execution.

Talfourd, Serjt., was not called upon to support the rule.

PER CURIAM (a).—The rule must be absolute.

Rule absolute.

(a) Pollock, C. B., Parke, B., Alderson, B., and Platt, B.

HARVEY v. DARINS.

LUSH had obtained a rule, calling upon the plaintiff to shew cause why the defendant, who had been arrested on a ca. sa., should not be discharged out of the custody of the sheriff of Devonshire; and why the order of Rolfe, B., of arrest on final the 23rd of December, 1848, should not be rescinded.

The defendant had been arrested on the 13th of December, 1848, on a ca. sa., issued on a judgment in an action of priest in ordidebt, brought by the plaintiff. On the 20th of the same Chapel Royal, month an application was made to discharge the defend- that he had ant, on an affidavit, setting forth the following facts: that during a prethe defendant is one of the priests in ordinary of her vious reign, Majesty's Chapels Royal; that it is his duty to attend at bad performed

The Court discharged a defendant out the sheriff on process, on the ground of his being privileged as a nary of the upon proof been appointed and that he his official duties on

several important occasions in the present reign; that his name was enrolled in the books of the Lord Steward, and that he received a salary; without proof that he had been re-appointed on the occasion of the present Sovereign; there being a letter of the Bishop of London appended to the affidavit, stating that no re-appointment was necessary on the demise of the Crown.

HARVEY

DAKINS.

stated periods and perform divine service in such of her Majesty's chapels as he may from time to time be directed to attend and perform divine service in; that he is liable, by virtue of his said office, to be called upon at any time to attend in person to perform the said duties; that his appointment to the said office took place in 1833, and that he had continued to discharge the duties of his office from thence hitherto. On the 23rd of December, it was dismissed by Rolfe, B., the learned Judge thinking that there was not sufficient evidence to shew that the defendant occupied any other situation than that of chaplain to King William the Fourth. A subsequent affidavit stated that the defendant was, immediately after the death of his late Majesty King William the Fourth, and upon the accession of her present Majesty Queen Victoria, together with several other priests in ordinary of her Majesty's Chapels Royal, presented to her Majesty, at a levee, by the Bishop of London, dean of the Chapels Royal; that he then kissed hands upon his re-appointment; that upon the marriage of her Majesty he attended in his official capacity as one of the priests in ordinary of her Majesty; that he had on several occasions since officiated and performed the duties of his ministerial office as one of the priests in ordinary to her said Majesty, at the Chapel Royal of St. James; that he has regularly received his salary as such priest in ordinary to her Majesty, by regular quarterly payments, from the pay office of her Majesty, and that he is now in the actual receipt of such salary, as such priest in ordinary, for performing his duties as one of the said priests in ordinary to her Majesty; that it was the practice at the Lord Steward's Office that the warrants or appointments of priests in ordinary to their office, should be entered in a book at the office; that no entries of any re-appointment of any priest in ordinary to the Chapels Royal, on the occasion of the demise of the Crown, from time to time, have ever been made at the said office; and that upon searching the books where such entries are usually made, from the time of the accession

of his late Majesty King George the Third to the present time, no entry of any such re-appointment could be found.

The affidavits were accompanied with a certificate of the sub-dean of the Chapels Royal, dated 7th October, 1833, of his having admitted the defendant to the office of a priest in ordinary to the Chapels Royal; and a letter from the Bishop of London, stating that in the case of a priest in ordinary, no re-appointment was necessary on the demise of the Crown, and that the warrant given by the dean remains in force till revoked.

HARVEY
9.
DAKINS.

Baddeley shewed cause. There is no evidence to shew that the defendant had ever been appointed priest in ordinary to the Crown. In such cases as the present the most ample and decisive proofs should be adduced, and this has not been done. The certificate of the sub-dean has been relied on, but that is no evidence of the appointment. It is merely a certificate of the fact of his having sworn the defendant, by virtue of a warrant addressed to him by the Bishop of London as dean. Consistently with that document, the defendant might have been nominated solely by the bishop, and hold the office entirely at his pleasure. In the letter of the bishop nothing is said of the appointment: there should have been a certificate from his lordship shewing what was the nature of the warrant issued by him to the sub-dean. The case of Winter v. Dibdin (a) differs from the present. There it was expressly alleged that the defendant had been re-appointed as one of her Majesty's chaplains. The case of Byrn v. Dibdin (b) is also dissimilar, for it contains a positive averment that the defendant, at the time of his arrest, was a chaplain in ordinary to the king. But, admitting that there was originally a nomination of the defendant as priest in ordinary to William the Fourth, there is no evidence of his re-appointment to that office under the present sovereign.

⁽a) 13 M. & W. 25; S. C. ante, vol. 2, p. 211.

⁽b) 1 C., M. & R. 821; S. C. 3 Dowl. 448.

1849.

Lush, in support of the rule, was not called upon.

HARVEY
v.
DAKINS.

Pollock, C. B.—There is evidence here that the defendant has performed the duties of his office on the occasion of the marriage of her present Majesty; that his name is enrolled in the books of the Lord Steward, and that he receives a salary. These facts, together with the certificate of the sub-dean and the letters of the Bishop of London, convince me that he is one of the priests in ordinary of her Majesty's Chapels Royal, and is therefore entitled to the privilege which he claims. I was at first inclined to look at this case with some strictness. I am, however, satisfied that it cannot be distinguished from those of Byrn v. Dibdin (a), and Winter v. Dibdin (b), and that therefore we are bound to concede to the defendant all the advantages belonging to the office which he holds.

PARKE, B., ALDERSON, B., and ROLFE, B., concurred.

Rule absolute.

(a) 1 C., M. & R. 821.

(b) 13 M. & W. 25.

FUTVOYE, Executor of ALDRED, deceased v. STEVENS.

DEBT. The first count of the declaration was upon a promissory note for 150*l*., made to the testator by the defendant. The second count was for 200*l*, for money due on an account stated with the testator. The third for 200*l*, on an account stated with the plaintiff.

Third plea to the sum of 111. 5s., parcel of the debts in the second and last counts, that the plaintiff ought not further to maintain his action thereof, for that after the com-

the payment without any special commencement of præcludi non: *Held*, on special demurrer, that the replication must be taken as if pleaded in maintenance of the action generally, and was therefore bad.

Debt by an executor. Plea to its further maintenance, payment after action brought, with prayer of judgment, if the plaintiff ought further to maintain his action. Replication, a traverse of

1849.

FUTVOYE

STEVENS.

mencement of the suit, and before declaration, the defendant paid to the plaintiff, and the plaintiff then accepted and received of and from the defendant, 14L, in full satisfaction and discharge of the said sum of 111. 5s., and of the causes of action in respect thereof. Verification and prayer of judgment, if the plaintiff ought further to maintain his action thereof.

Replication to the third plea, that the defendant did not pay to the plaintiff, nor did the plaintiff accept and receive from the defendant the said sum of money in the said third plea in that behalf mentioned, in satisfaction or discharge of the said cause of action in the introductory part thereof mentioned, and to which the same is pleaded; modo et Conclusion to the country, &c.

Special demurrer, on the ground that the third plea, being a plea to the further maintenance of the action as to the causes of action in that plea mentioned, the replication ought to have been pleaded with the proper commencement, viz., that the plaintiff ought not to be barred from further maintaining his action; and that the replication was pleaded as if the third plea were a plea in bar of the action generally, instead of a plea to the further maintenance thereof. Joinder in demurrer.

Karslake, in support of the demurrer. The replication is bad, from the absence of the proper formal commencement. It is a replication to a plea against the further maintenance of the action, and should therefore be prefaced with a præcludi non. By the Reg. Gen., Hilary Term, 4 Wm. 4, r. 9, it is said that "in a plea, or subsequent pleading, intended to be pleaded in bar, of the whole action generally, it shall not be necessary to use any allegation of actionem non, or to the like effect, or any prayer of judgment; nor shall it be necessary in any replication, or subsequent pleading intended to be pleaded in maintenance of the whole action, to use any allegation of præcludi non, or to the like effect, or any prayer of judgment; and all

FUTVOYE v.
STEVENS.

pleas, replications, and subsequent pleadings pleaded without such formal parts as aforesaid, shall be taken, unless otherwise expressed, as pleaded respectively in bar of the whole action." Not having the præcludi non, it must be taken as pleaded in maintenance of the whole cause of action, and consequently is informal.

Prentice, in support of the replication. The ninth rule does not apply to a replication of this description. the new rules, it was never necessary that the præcludi non should be introduced, where the plea amounted to a direct traverse. In Tidd's Forms, the old forms of pleas of the general issue, and non est factum are given; and in them the only formal commencement is, the "defendant comes and defends the wrong." In 1 Chit. on Plead. 577, 7th ed., it is said, "In a plea of the general issue, or other plea in bar to the whole declaration, which merely denies what was alleged in the declaration, and does not introduce any new matter, it is not usual to insert the allegation ' that the plaintiff ought not to have or maintain his aforesaid action against the defendant; but after stating the defendant's appearance and his defence, the plea immediately denies the matter stated in the declaration, and concludes to the country." So, too, in Brown v. Cornish (a), it was held that a plea which admits the plaintiff once had a cause of action, ought not to begin with an onerari non. shews that formerly a clear distinction was drawn between pleas which were mere traverses, and those that subsequently set up new matter of defence. In rendering it imperative to adopt such a commencement, the object was merely to give a character to the defence about to be set up, and would not apply to a replication of the kind now demurred The plea begins by stating that the plaintiff ought not further to maintain his action; that gives the nature of the defence; and it would be useless in the replication to have

a similar formal commencement; Stephen on Pleading, 444, 5th ed. And if the præcludi non was not necessary in mere traverses before the new rules, still less would it be required since their adoption; for the very object of the introduction of this was to do away with all superfluous formulæ (a). If such a commencement be necessary in this replication, by a parity of reasoning, the general issue should commence with an actionem non. Again, the replication concludes to the country, and it has been decided that it is the conclusion which makes the pleading (b).

FUTVOYE

STEVENS.

Karslake, in reply. The case of Rosling v. Muggeridge (c) shews that the plea would have been bad, if it had not had the proper formal commencement. It is necessary that it should be shewn to what, a replication, as well as a plea, is pleaded. All the precedents in the old reports begin with the proper formal commencement.

PARKE, B.—I am of opinion that there should be judgment for the defendant. In the absence of any authority, we must be bound by the words of the new rules. What do they say? (His Lordship read the ninth rule.) By the very words, therefore, of the rule, it must be taken that this replication was pleaded in maintenance of the whole action. Is that formal? The defendant, by his plea, admits that the plaintiff had a rightful cause of action, up to the period of payment. The plaintiff, by the nature of his replication, repeats what the defendant has admitted. This is informal, and as the objection has been taken on special demurrer, it must prevail.

ROLFE, B., and PLATT, B., concurred.

Judgment for the Defendant, with leave to the Plaintiff to amend.

⁽a) Stephen on Pleading, App. 94. (c) 16 M. & W. 181; S. C. (b) Talbot v. Hopwood, Fortes- ante, vol. 4, p. 298. cue, 335.

1849.

MORGAN v. CUBITT and Another.

Declaration in case against the sheriff for the escape of one H., taken in execution upon a judgment at the suit of the plaintiff. Plea in bar, the coverture of the plaintiff, at the time of the accruing of the debt for which judgment reco vered, and thence bitherto: Held, on special de murrer, that the plea was not a good plea in bar.

Quare, whether the plea would have been substantially good, if pleaded in abatement. CASE against the sheriff of Middlesex for permitting the escape of one William Hanson, after arresting him on a ca. sa. upon a judgment recovered against him by the plaintiff.

Plea in bar, that the plaintiff ought not to have or maintain her aforesaid action against the defendants, because the defendants say, that before and at the time of the accruing of the said debt, in respect of which the said judgment was so recovered, as in the said declaration mentioned, and from thence until and at the commencement of the action, in respect of which the said judgment was so recovered, and from thence until and at the time of the recovery of the said judgment, and from thence until and at the time of the said arrest of the said William Hanson, and from thence continually until and at the time of the committal of the alleged grievances, and from thence hitherto, the plaintiff was and still is married to one Henry Stocker during all those several times, and still being her husband, and who is still living. Verification—prayer of judgment.

Special demurrer, assigning for cause among others, that the matters pleaded were pleadable in abatement only, and not in bar of the action; and that the plea was a plea in abatement; inasmuch as to be a good plea in bar, it ought to have shewn that Stocker had interfered to reduce the judgment mentioned in the declaration into his own possession, or that Stocker had made the judgment his sole property, or that Stocker had dissented from the right of the plaintiff to bring the present action; that the plea was multifarious; and that it set up as a defence to the action, matter which was pleadable only as a defence to the action, in which the judgment was recovered. Joinder in demurrer.

The points stated for argument on the part of the defendants were, that a married woman cannot sue out execution on a judgment, obtained by her in respect of a debt contracted with her during coverture; that it is her husband's judgment, and in the event of her death such judgment would have survived to him without a scire facias; or if she do so, the levying execution by the wife was for the benefit of the husband, and a reducing into possession for him, and that an action for an escape from such execution vested solely in him; that the plea of coverture was a good defence to this action in bar, and was properly pleaded as such; and shewed that the whole cause of action vested in the plaintiff's husband alone; that a plea in bar is not double, because it may contain matter pleadable in abatement; that it was admitted in the pleadings that the plaintiff was a married woman, and therefore she should have appeared in person and not by attorney; and that the plaintiff should have replied that this action was brought by her for and on behalf of her husband, and with his assent.

MOBGAN
v.
CUBITT
and Another.

Prentice in support of the demurrer. This plea, of the plaintiff's coverture, if at all, ought to have been pleaded in abatement, and not in bar of the action. It has already been frequently decided, that the nonjoinder of the husband is a matter for a plea in abatement only; Bendix v. Wakeman(a), Com. Dig. tit. "Abatement," (E. 6). But supposing, that in the original action it might have been pleaded in abatement, it is clear, that the sheriff cannot take advantage of it. The husband only can do so; Milner v. Milnes (b); Morgan v. Painter (c); and he must bring a writ of error on the original judgment; Bac. Abr. tit. "Error," (B.) Nothing can be pleaded to a scire facias on a judgment,

⁽a) 12 M. & W. 97; S. C. ante, (b) 3 T. R. 627. vol 1, p. 450. (c) 6 T. R. 265.

1849. MOBGAN CUBITT and Another. which might have been pleaded in the original action; Baylis v. Hayward (a). This is an attempt on the part of the sheriff to impeach the original judgment, which he cannot do. [He was then stopped.]

M. Dawson (Burchell was with him), in support of the It is not the intention of the defendants to attempt to invalidate the judgment. But according to the dictum of Cresswell, J., in the case of Guyard v. Sutton (b), this would be a good plea in bar, if it could be shewn that the wife could not sue at all, either with or without her husband. It must appear, however, that she had no interest whatever in the subject-matter of the action; Chitty on Pleading (c); Bendix \vee . Wakeman (d); Brashford \vee . Buckingham(e); Wills v. Nurse(f); Yard v. Ellard(g). Here, by the recovery of the judgment, the debt became a debt due to the husband; he alone could have levied execution, and the adoption of that course by the wife could only have been for his benefit; Underhill v. Devereux (h); Pierce v. Thornley (i). Again, the taking in execution is equivalent to payment; Burnaby's case (k); Cohen v. Cunningham (1); Chilton v. Whiffin (m). But as upon payment, the money would have become the property of the husband, so the arrest was a reduction of the debt into possession for his benefit only. He, therefore, was the only person damnified by the escape, and, consequently, the only person entitled to sue. [Parke, B.—If taking the body of the debtor in execution is the same as the

⁽a) 4 A. & E. 256; S. C. 5 N. & M. 613.

⁽b) 3 C. B. 153.

⁽c) Vol. 1, p. 464, 7th ed.

⁽d) 12 M. & W. 97; S. C. ante, vol. 1, p. 450.

⁽e) Cro. Jac. 205.

⁽f) 1 A. & E. 65.

⁽g) Carth. 462; S. C. Ld.

Raym. 368; 12 Mod. 207.

⁽h) 2 Wms. Saund. 72, i., 6th ed.

⁽i) 2 Sim. 167.

⁽k) 1 Stra. 653.

⁽l) 8 T. R. 123.

⁽m) 3 Wils. 13; S. P. Vanderheyden v. De Paiba, ibid. 528.

reduction into possession of a chattel, then your argument might be well founded. That, however, is not so. mere arrest is not payment, and the judgment remains still unsatisfied].

1849. MOBGAN CUBITT and Another.

PARKE, B.—You contend that by taking the body of a debtor the debt is satisfied. No doubt, that is so far a satisfaction, as to prevent the creditor from issuing any other execution against him upon the judgment. If, however, the debtor die or escape, it immediately revives. I do not mean to say, that this plea might not have been sufficient, if it had been pleaded in abatement, but it is certainly not a good plea in bar.

ROLFE, B., and PLATT, B., concurred.

Judgment for the Plaintiff.

HUTT v. MORELL.

 N_{EEDHAM} had obtained a rule calling upon the plaintiff $_{ ext{To an action}}$ to shew cause why the following pleas should not be pleaded of trover, the Court allowed in an action of trover. First, not guilty; secondly, not the defendant possessed; thirdly, leave and license; fourthly, a special pleas containjustification under a distress for rent within six months defe after the end of a term under the 8 Anne, c. 14; fifthly, by plea that the way of estoppel, that the plaintiff impleaded the defendant impleaded the in the Court of Queen's Bench, in respect of the same the Queen's Bench in recauses of action, that the said Court gave judgment for the defendant upon a demurrer to the plaintiff's replication to same causes the defendant's plea, which judgment was afterwards that the Court affirmed by the Court of Exchequer Chamber; sixthly, ment for the the Statute of Limitations; seventhly, an avowry for rent defendant upon demurrer

to plead, with spect of the of action, and to the plain-

tiff's replication, which judgment was subsequently affirmed by a Court of error.

HUTT
v.
MORELL

under the 11 Geo. 2, c. 19, s. 22. Rolfe, B. had disallowed the fifth plea.

J. Henderson shewed cause. The plea sought to be pleaded, is bad; and even if it should be considered as arguable, still it should not be allowed. It would be in violation of the rule upon which the doctrine of estoppel And the rule applies only where the same point has been already adjudicated. Here the same matter has not been adjudicated. The doctrine of estoppel has been fully considered in Carter v. James (a), when it was decided, that the admission of a matter on the record, in an action, was not sufficient to estop the parties from disputing it in a subsequent proceeding. [Parke, B.—In that case the Court seemed to have overlooked the effect of the old doctrine relating to protestation in pleading. The old doctrine was, that if you take issue on one fact, and it be proved against you, you admit the other facts, not merely for the purposes of that action, but for all We recently considered this question in the case of Boileau v. Rudlin (b)]. The permitting several pleas to be pleaded, is a matter within the discretion of the Court, which will only allow such defences as are essential to the justice of the cause; Gully v. Bishop of Exeter (c).

Needham, in support of the rule. The plea objected to raises a fair point for argument, and should therefore be allowed. If it be not permitted, it will entail a very great hardship on the defendant. [Alderson, B.—You have a perfect right to raise the defence in that plea, if you wish it; the only question is, whether you can plead it in conjunction with the other pleas]. If the Court does not allow this plea in connection with the others, and the defendant, shall afterwards fail on those which have been

⁽a) 13 M. & W. 137; S. C. (c) 5 Bing. 171; S. C. 2 M. ante, vol. 2, p. 236. & P. 266.

⁽b) 2 Exch. 665.

allowed, he will have been deprived of what might be a good defence; General Steam Navigation Company v. Guillou (a). [Parke, B.—It may be that under a plea of not guilty, or not possessed, you might give the matter of the estoppel in evidence].

HUTT v. Morell

Pollock, C. B.—I think that estoppels like this are available, in order that the same matter may not be twice litigated; and consequently, when by some regular proceeding as by actual judgment recovered, or by admission on the record, a party is precluded from any longer discussing the same matter, I do not see why in the exercise of our discretion we should not give effect to it. I think, therefore, that these pleas should be allowed, and the rule made absolute.

PARKE, B.—We ought not to be too strict in such matters as the present.

ALDERSON, B. and ROLFE, B. concurred.

Rule absolute.

(a) 11 M. & W. 877.

WILLIAMS and Another v. GRIFFITH.

CASE. The first count of the declaration was against the sheriff for an escape.

In a declaration against the sheriff for an escape.

The second count stated that, whereas one Lewis Lewis,

In a declaration against a sheriff for not executing a ca. sa. or a fi. fa., the

plaintiff must shew that he had a judgment in his favour to warrant the writ.

The writ of capias given by the 1 & 2 Vict. c. 110, can only be obtained by a person who is plaintiff in the action, and after the commencement of the suit.

Where, therefore, in an action against the sheriff for neglecting to arrest one L., the declaration stated that L. was indebted to the plaintiffs, and being so indebted, the plaintiffs caused, by virtue of a special order made by a learned Judge, to be issued a certain writ, called a capias, against the said L., and directed to the sheriff; but omitted to aver that the plaintiffs were plaintiffs in an action against I_L, or that a writ of summons had been previously issued: Held bad in arrest of judgment, as it did not shew that the plaintiffs were entitled to the capias; and, therefore, disclosed no duty on the part of the sheriff towards them to execute it.

VOL. VI.

a a

D. & L.

WILLIAMS and Another c. GRIFFITH.

theretofore to wit, on the 12th day of May, A.D. 1847, was indebted to the plaintiffs in a large sum of money, to wit, the sum of 32l. 8s., upon and in respect of certain causes of action, before then accrued to the plaintiffs against the said Lewis Lewis; and the said Lewis Lewis being so indebted, the plaintiffs, theretofore to wit, &c., according to the form of the statute in such case made and provided, and under and by virtue of a special order duly made, in that behalf, of and by Mr. Baron Alderson, one of the Judges of one of her Majesty's Superior Courts at Westminster, to wit, of her Majesty's Court of Exchequer of Pleas, caused to be issued in due form of law, out of her Majesty's said Court of Exchequer of Pleas, at Westminster, in the County of Middlesex, against the said Lewis Lewis, a certain writ of our said Lady the Queen, called a capias, directed to the sheriff of Merionethshire. It then set out the writ, and proceeded to aver that, afterwards and before the delivery thereof to the sheriff of the said county of Merionethshire, to be executed, as thereinafter mentioned, to wit, on the day and year first aforesaid, the said writ was marked and indorsed for bail for 321. 8s., by order of the Hon. Mr. Baron Alderson, according to the form of the statute in such case made and provided. The declaration then stated the delivery of the writ to the sheriff, and his neglect to arrest Lewis in pursuance thereof.

Plea, not guilty.

The case came on for trial before Wilde, C. J., at Dolgelly, at the last Merionethshire Summer Assizes, when the plaintiffs obtained a verdict on the second count, with 37l. damages.

A rule having been obtained on the part of the defendant, in the following Term, calling on the plaintiffs to shew cause why the judgment should not be arrested, on the ground that the declaration did not disclose any duty imposed on the sheriff to execute the writ of capias; it not being averred that any writ of summons had issued in the action of Williams v. Lewis.

Welsby, (with whom was Egerton), now shewed cause. The defect complained of has been cured by the verdict. There is an averment, of a debt due from Lewis, and the writ and its delivery to the defendant, were proved. No damages could have been recovered, had the existence of the debt not been established, as well as a writ of summons shewn to be issued. It will be presumed, therefore, that a writ of summons was issued. But further, the writ given by statute 1 & 2 Vict. c. 110, says nothing about a preceding writ of summons. The form is, "We command you to enter," &c., "and take C. D.," &c., "and him safely keep, until he shall have given you bail" "in an action on promises," "at the suit of A. B." The sheriff is bound to obey this writ, and is not to pause to inquire whether all the previous proceedings have been regular; Thomas v. Hudson (a). [Parke, B.—In the case of Nightingale v. Wilcoxson (b), a Court of Error decided, that in a declaration against a sheriff for an escape, it was sufficient to allege that a writ directing the arrest, was "duly indorsed for bail," without adding "by virtue of an affidavit made and filed of record." There Bayley, J., in giving judgment, says, "The declaration then proceeds to allege that they, for the recovery of their debt, sued out a writ of capias ad respondendum, with an ac etiam clause, commanding the arrest of the alleged debtor; that this writ was duly marked and indorsed for bail for 25L, and so marked and indorsed, was delivered to the sheriff to be executed; and it then proceeds to allege the grievance. We think this is sufficient, and that the writ, which is stated to have been prosecuted out of this Court, is not to be presumed to have issued improvidently." That decision appears to approach the nearest to the position for which you are contending]. That case cannot be distinguished from the present. Besides, the capias was duly issued upon the order of a learned Judge, and it must

WILLIAMS and Another v.
GRIFFITH.

⁽a) 14 M. & W. 353; S. C. ante, vol. 2, p. 873.

⁽b) 10 B. & C. 202; S. C. 5 M. & R. 169.

WILLIAMS and Another v.
GRIPFITH.

surely be presumed that he did not do so, without having all the grounds before him on which to grant it, viz., the writ of summons, and the affidavit of the plaintiff's debt.

Crompton, in support of the rule. The second count of the declaration is bad. It shews no legal process to which Lewis was bound to appear, and therefore discloses no cause of action. All the old authorities in an action for escape on mesne process, state that, ad largum ire permisit, and that the defendant non comparuit ad diem; The Sheriff of Nottingham's case (a); Randell v. Wheble (b); Williams v. Mostyn (c). There is no averment of duty on the part of Lewis to appear. The sheriff is not liable for not arresting, unless the learned Judge, by whom the order was made, had jurisdiction over the matter. In Jones v. Pope (d), it is said, that "though the sheriff would be excused for executing the writ, because he is not to examine the act of the Court, and perhaps would be fined for the escape, as a contempt to the Court, in not obeying the process of the Court, and doing his duty; yet a party cannot bring an action of debt against him for the escape, because there was no debt due to the plaintiff, nor any duty to him;" and a similar doctrine is expressed in Bac. Abr. tit. "Escape," (A). The right to issue the capias in this case is founded on the 1 & 2 Vict. c. 110. section abolishes arrest on mesne process, except in certain The second requires that all personal actions should be commenced by writ of summons. The third then proceeds to enact, that if a plaintiff in any action shall shew to the satisfaction of a Judge, &c., that such plaintiff has a cause of action against the defendant, it shall be lawful for the Judge, by special order, to hold him to bail, and it shall also be lawful for the plaintiff thereupon

⁽a) Noy, 72.

Dowl. 38.

⁽b) 10 A. & E. 719; S. C. 2 P. & D. 602.

⁽d) 1 Wms. Saund. 37, 38 b, 6th ed.

⁽c) 4 M. & W. 145; S. C. 7

to sue out a capias, &c. Before then, the Judge could make such an order, the proceedings must be commenced by writ of summons, and the application made by the plaintiff in the action. But on the present declaration this does not appear. The sheriff is justified therefore, in saying, that the Judge had no jurisdiction, and that he was not compelled to arrest. [Parke, B.—The question is, whether we are not bound to presume that what has been done by the special order of a learned Judge is warranted by the act of Parliament, until the contrary appears.] The plaintiff should shew all the matters which give the Judge jurisdiction. If it had been averred that a writ of summons had been issued, it might have been traversed.

WILLIAMS and Another 5.
GRIPPITH.

Cur. adv. vult.

PARKE, B., now delivered the judgment of the Court (a). -We are of opinion that the rule to arrest the judgment in this case should be made absolute. The principle on which an action is maintainable against a sheriff for neglect of duty, in not arresting, or permitting an escape, is clearly laid down in Jones v. Pope. It is not simply because a person sues out a writ directed to the sheriff and delivers it to him that he can bring an action for not obeying it; but because in mesne process there is a cause of action, and in final process there is judgment against the party defendant, which gives the plaintiff an interest in the writ which creates the duty in the sheriff towards him. Although the sheriff is excused for executing the writ, issued without cause of action in the one case, or judgment in the other, because he is not to examine the act of the Court but to obey it; and although he may be punishable by the Court for his disobedience for contempt if he do not obey it; yet there is no duty to the party suing it out, unless he be entitled to do so. It is essential, therefore, in an action for

⁽a) At the sittings in banc., after Hilary Term, 1849.

WILLIAMS and Another s. GRIFFITH.

disobeying a ca. sa. or fi. fa., that a party should shew he has a judgment in his favour; as, in an action for disobeying mesne process (while that distinction existed), it was necessary to shew that he was a creditor. The title of any one to sue out the new species of capias, founded on the statute of the 1 & 2 Vict. c. 110, depends on his being plaintiff in the suit, as well as having cause of action. By section 3 the plaintiff alone can sue it out; and by section 5 he must do so after the commencement of the suit; which, by the 2nd section, must be begun by a writ of summons. the plaintiffs in this action were plaintiffs when they sued out the capias, the sheriff owed no duty to them. this fact does not appear by positive averment, nor is it necessarily included in any allegation to be found in the declaration. Had it appeared that they were plaintiffs when they sued out the writ, the allegation that the capias was duly sued out by order of Baron Alderson, would probably have been sufficient in the mode in which it is stated in the declaration in this case; without averring that the plaintiffs made an affidavit shewing to the satisfaction of the Judge that they had a cause of action to the amount of 201, and that there was probable cause for believing that the defendant was about to quit England. [See Nightingale v. Wilcoxson (a).] The presumption would be, that all the steps necessary to be taken by the practice of the Court, and the statute law, for the due issuing of the writ, were taken. But it is absolutely necessary to shew the plaintiff was a person who had a right to sue out the writ, in order to enable him to bring an action against the sheriff; and this declaration does not shew that, and the case referred to is no authority for holding that this can be presumed. It was suggested by the plaintiffs' counsel, that the plaintiffs could not have had any damages found for them, unless they had proved on the trial they were the persons entitled to sue out the writ, by shewing they were plaintiffs; but

this argument is, we think, untenable. If it could avail, every defective declaration might be cured. The declaration has been framed on precedents for actions on escape on mesne process, without adverting to the different nature of the process, which is the commencement of the suit, from that process which is not. Therefore, the rule must be absolute to arrest the judgment.

1849. WILLIAMS

and Another GRIFFITH.

Rule absolute.

CURLEWEIS v. CLARK.

DEBT, for 40% for goods sold, for 40% for work done, To a declaand for 40% on an account stated.

To the first and last counts, except so far as they relate to the sums of 10L and 9L 15s. 6d., parcel of the said the defendant monies in the first and last counts, &c., that the debts and causes of action in those counts mentioned, except so far as they relate to the said sum of 9L 15s. 6d., accrued to the plaintiff before the making of the agreement hereinafter mentioned, to wit, for clothes delivered by the plaintiff to the defendant; that after the accruing of the said debts and causes of action, except, &c., it was agreed between the plaintiff and the defendant, in consideration that the defendant would deliver to the plaintiff an acceptance of the Earl of Mexborough for 251., to wit, a certain stamped document, of which the defendant was the holder, accepted accrued to the by the said Earl, without the name of a drawer, but with a the making of

ration in debt containing three counts for 401. each, pleaded, first, as to the first and last counts, except so far as they relate to the sums of 10%, and 9L 15s. 6d. parcel of the said monics, &c.; that the debts, &c., in those counts mentioned. except so far as they relate to the said sum of 91.15s. 6d., the agreement thereinafter

mentioned, to wit, for clothes delivered by the plaintiff to the defendant; that after the accruing of the said debts, &c., except, &c., it was agreed between the plaintiff and the defendant, in consideration that the defendant would deliver to the plaintiff an acceptance of the Earl of M., to wit, a certain stamped document, of which the plaintiff was the holder, accepted by the said Earl, without the name of the drawer, but with a blank space for it; the plaintiff would discharge the defendant from all claims for clothes, if the acceptance should be paid in six months; and if it should not be paid in that time, the defendant should be liable to pay the plaintiff 10% only on account of clothes, and that the said acceptance should be a full discharge and satisfaction of so much of such last mentioned claim as should exceed the sum of 10/.; that the defendant did deliver to the plaintiff the said acceptance, and that the same was not paid within six months, and the defendant thereby became liable to pay the said sum of 10L only.

Held, on special demurrer, that the plea was good.

1849.
CURLEWEIS
7.
CLARK.

blank space for it, the plaintiff would discharge the defendant from all claims for clothes, if the acceptance should be paid in six months; and if it should not be paid in that time, the defendant should be liable to pay to the plaintiff the sum of 10L only on account of clothes; and that the said acceptance should be a full discharge and satisfaction of so much of such last mentioned claim as should exceed the sum of 10L; that the defendant did deliver to the plaintiff the said acceptance; that the same was not paid within six months; and that the defendant thereby became liable to pay the said sum of 10L only. Verification.

Special demurrer. The chief causes assigned were, that the bill did not appear to have been negotiable, or of any use or value to the plaintiff; nor did it appear how a bill of 25*l.* could be a satisfaction for 60*l.* 4s. 6d.; and that the plea did not shew that the sum of 10*l.* had been in fact paid by the defendant to the plaintiff.

Needham, in support of the demurrer. The plea is bad. It proposes to answer the sum of 80L, except 19L 15s. 6d., and does so by stating an agreement that the defendant should deliver to the plaintiff an acceptance of a third party, which, if liquidated in six months, should operate as a discharge, but if not, he should be called on to pay 101; and it does not aver payment of that sum. Secondly. It does not appear that the bill was negotiable; and the delivery of a non-negotiable bill for 25% cannot be an answer to a demand for 60l. 4s. 6d.; Cumber v. Wane (a); Kemp v. Watt (b). [Parke, B.—The question is, whether the handing over of a non-negotiable instrument is an answer to the demand.] Thirdly. The plea is bad for being a plea of accord without satisfaction; Gifford v. Whittaker (c); Evans v. Powis (d). [Parke, B.—The only point is, whether the delivery of an incomplete instrument,

⁽a) 1 Smith's Lead. Ca. 146, ante, vol. 4, p. 21. 2nd ed. (c) 6 Q. B. 249.

⁽b) 15 M. & W. 672; S. C. (d) 1 Exch. 601.

with power to fill it up, is sufficient.] He referred to Schultz \forall . Astley (a).

CURLEWEIS
v.
CLARK.

Rew, contrà, was not called on.

POLLOCK, C. B.—I am of opinion that this plea furnishes a sufficient answer to the action. It discloses an agreement by which the plaintiff was to take a certain chattel, namely, a bill of exchange, which was afterwards to be filled up with the name of the drawer; that if it was made available on its arrival at maturity, it should operate as an extinguishment of the debt, but if not, then the defendant should be liable to the extent of 10%. The defendant is therefore entitled to judgment.

PARKE, B.—I am of the same opinion. The plea is pleaded to two counts, each for 40L, minus 19L 15s. 6d., and states that the plaintiff agreed to accept a piece of paper, which might be made valuable by the insertion of the name of a drawer, as a satisfaction for 80l., if the bill should be paid at maturity; but if not, then the plaintiff should be liable for the payment of 101. And the question is, is such an agreement a good answer? I think that it is. It is a different matter whether the plaintiff may or may not have made a good bargain. He has accepted a chattel which was capable of being rendered valuable. If a good consideration exists, the Court will not inquire into the adequacy of the value. Mr. Needham contends that the effect of the plea is, that if the bill of exchange is not honoured when it arrives at maturity, the defendant is to pay the sum of 10*l*; and that the plea is therefore bad for not averring that it has been paid. I must confess that I do not so read it. It merely states that the defendant has become liable to pay that amount; and there is a great difference between a liability to pay, and an agreement to pay. The effect of the transaction is, that the defendant

⁽a) 2 Bing. N. C. 544; S. C. 2 Scott, 815.

CURLEWEIS

CLARK.

has reduced his liability to 10L, which sum has been paid into Court (a).

ALDERSON, B.—I am also of the same opinion. The plea is perfectly good. We cannot attempt to estimate the value of Lord Mexborough's acceptance.

PLATT, B.—I entirely concur in what has been said. The plea professes to be pleaded to that portion of the two counts which does not include the sum of 191. 15s. 6d., and surely to that it is a good answer.

Judgment for the Defendant.

(a) There was a plea of payment of 10l., and 9l. 15s. 6d. into Court.

The BANK OF ENGLAND v. JOHNSON, P. O.

A creditor of a joint stock banking company, established pursuant to 7 Geo. 4, c. 46, who has obtained judgment against the public officer, cannot, after unsuccessfully suing MARTIN had obtained a rule calling upon certain persons, of the names of Brooke, Gibson, Ridley, Clarke, Beverley, and Rawson, to shew cause why writs of scire facias should not issue against them, on the ground of their having been members of a joint stock banking company at the time of the contracts, on which the action was brought, being entered into.

out execution against a member for the time being, lie by for a period of time, and then come to the Court for leave to issue execution against members at the time of the contract entered into, on affidavits shewing that execution against members for the then time being, would prove fruitless; unless he can also show that further efforts at execution against the members for the time being at the time when he first issued execution, would also have been fruitless.

where the plaintiffs, in December 1846, had obtained judgment, and unsuccessfully issued execution against a member for the time being, of a joint stock banking company, but had not taken any further steps; although there were at the time two solvent persons, members of the copartnership: Held that they were not entitled, in Hilary Term, 1849, to a sci. fa. to have execution against the members at the time of the contract being entered into.

Where a member of such a copartnership had ceased to be a shareholder before the time when the contract was made, on which the company was sued, and had caused his name to be omitted in Schedule A., but had neglected to have it inserted in Schedule B., pursuant to the 7 Geo. 4, c. 46, s. 4: *Held*, that the question of his being a shareholder at the time of the contract, was a matter to be tried on scire facias.

Semble, also, that a scire facias against members at the time of the contract being entered into, should state the prior execution against the members at the time of the execution, which is a condition precedent, and necessary to warrant the scire facias against a member at the time of the contract being entered into.

From the affidavits it appeared that, before and at the time of contracting the debt for which the action had been brought, a banking company had been established, pursuant to the 7 Geo. 4, c. 46, called the Newcastle-upon-Tyne Joint Stock Banking Company. Of this copartnership, at the period of the commencement of the action, Thomas Johnson, the nominal defendant, was the registered public officer. The action was brought by the plaintiffs, as holders of twenty-seven bills of exchange indorsed to them by the company between the 20th of November, 1845, and the 22nd of January, 1846; and was commenced on the 11th of June, 1846, against Johnson, the nominal defend-Final judgment was signed therein on the 7th of October, 1846, for 5872l. 16s., the amount of the debt and interest, besides costs; and on the 8th, a fieri facias was issued against Johnson, to which the sheriff returned nulla bona. It did not appear clearly on the affidavits whether this execution was issued against him as a shareholder, or as public officer. It was also alleged in the affidavits in support of the rule, that the deponents had been informed and believed that before the judgment was obtained, all the shareholders, (except T. C. Gibson and G. Rawson), who possessed any property which could be obtained by the creditors of the company, had ceased to be shareholders; and that where there had been any transfer of shares since the date of the judgment, the new shareholders were possessed of no property which could be made available for the payment of the debt in question. That the only means for the plaintiffs to recover their debt, were by the enforcement of payment from the persons who were shareholders at the period when the contracts were entered into, but who had since retired. That the deponents were informed and believed that nothing would have been obtained, if execution had at any time since the judgment been put in force against the persons who were shareholders at the date of the judgment, or who have since become shareholders, BANK of ENGLAND

BANK OF ENGLAND v. JOHNBON. except the said T. C. Gibson and G. Rawson. The affidavits were accompanied by a list of the names of the shareholders for the time being, with a statement annexed, shewing their inability to satisfy the judgment. This was verified by affidavit. Brooke, one of the parties against whom the present rule was obtained, was a member in March, 1845, but sold his shares in the August following. His name, although omitted in schedule A., was not inserted in schedule B., as it should have been, as a person who had ceased to be a member, in the return of the names and places of abode of the partners, made to the Stamp Office, on the 4th of September, 1845. In the return entered on March, 1846, he was stated to have retired from the copartnership.

W. H. Watson now shewed cause for Brooke. This application, as far as regards Brooke, cannot be sustained. First, he was not a shareholder at the time of the contract. The first contract was on the 20th of November, 1845. Now his affidavit states that he had disposed of his shares in the August of that year. In the return made to the Stamp Office also, pursuant to the provisions of the 7 Geo. 4, c. 46, s. 4, in the following September, his name is omitted. It will, indeed, be contended, that that is inadmissible as evidence of his retirement, since it is in the form of schedule A. given in the act, whereas it should have been in that of schedule B. That, however, is not conclu-Besides, in the subsequent return of March, 1846, his name is stated among those of the persons who had ceased to be members. The Court, therefore, will consider that there is ample proof of his withdrawal. But, secondly, the 13th section of the 7 Geo. 4, c. 46, expressly provides that no execution shall issue after the expiration of three years next after any person shall have ceased to be a member of a copartnership; and his affidavit clearly shews that more than that time had elapsed.

The Attorney General (Sir J. Jervis), Cleasby, Fitzherbert, Willes, and Manisty, on behalf of the other parties, shewed The plaintiffs have not complied with the requisitions of the 7 Geo. 4, c. 46, and therefore are not entitled to The 13th section provides that execution shall issue first against the members for the time being, and in the event of its proving ineffectual, then against those who were members at the time the contract was entered into. There are, therefore, two primary classes against whom creditors may proceed: the first consisting of those who are members for the time being, and the second composed of those who were members at the making of the contract. But, before the latter can be made liable, the Court must be satisfied that the former has been exhausted. not been done in the present instance. It is not shewn that any attempt has been made to obtain payment from the members for the time being. It is also admitted, that at the time when judgment was obtained, and execution issued against Johnson, there were two solvent members, Gibson and Rawson, against whom no proceedings were taken, although such a course might have been accompanied with success. Eardley v. Law (a) is in point. There the Court of Queen's Bench refused to allow a scire facias against former members of a company, on the ground that it was not shewn that a bonâ fide effort had been made to obtain satisfaction from the existing members. [They also referred to Bradley v. Eyre (b). Dodgson v. Scott (c) was referred to by Parke, B.]

Martin, in support of the rule. First, the objection raised by Brooke is untenable; persons who have been members of a copartnership are to continue to be regarded as such until they relieve themselves in the manner indicated by the act of Parliament. That renders it imperative that the

1849.

Bank of England v. Johnson.

⁽a) 12 A. & E. 802; S. C. 4 P. 11 M. & W. 432. & D. 379. (c) Ante, p. 27; S. C. 2 Exch.

⁽b) Ante, vol. 1, p. 260; S. C. 457.

BANK of ENGLAND

JOHNSON.

retirement of such individuals should be inserted in a return prepared in the form given in schedule B. This Brooke neglected to do. He will, therefore, be considered as a member at the time the contract was made; Field v. M'Kenzie (a); Harvey v. Scott (b). Secondly, the act does not say that the members of the first class should be exhausted; it only requires that a fair attempt should be made to obtain payment from them. The plaintiffs have shewn that any attempt to get satisfaction from persons composing that class in the present instance would be ineffectual; and are, therefore, entitled to proceed against those of the second class.

Cur. adv. vult.

PARKE, B., now delivered the judgment of the Court.— The judgment I am about to deliver is that of the Lord Chief Baron, my Brother *Platt* and myself; although we have no reason to suppose that my Brother *Alderson* differs from us.

An application was made for leave to issue a scire facias against Mr. Brooke, and also against other individuals who were alleged to have been members of a joint stock banking company at the time the contract was entered into, in which the plaintiffs recovered judgment; the execution against the members for the time being having proved fruitless. The judgment was obtained on the 7th of October, 1846, against Mr. Johnson, as public officer of the banking company. On the 8th, a fieri facias issued against him, which proved unproductive. Two persons of the name of Gibson and Rawson were then shareholders, and then possessed property; and they, from the return of the names of the present members, set out in the affidavits, have ceased to be such.

On the part of Mr. Brooke, Mr. Watson shewed cause, and objected that on the affidavits it appeared that Mr.

⁽a) Ante, vol. 5, p. 172; S. C. 4 C. B. 705.

⁽b) 11 Q. B. 92.

Brooke had ceased to be a partner before the first contract took place. His name was omitted in the return that was made on the 9th of September, 1845; but the return was not in the form required by the statute, a wrong schedule having been adopted. The first contract declared on was on the 20th of November, 1845. There was a positive affidavit of Mr. Brooke, that he had sold his shares in August, 1845. It was answered, that the question whether Mr. Brooke was a shareholder at the time of the contract was matter to be tried on scire facias, when the sufficiency of the return which omitted his name might be properly decided; and although upon these affidavits there appears to be no chance of fixing him as a partner at the time the contract was made, we think we cannot refuse to the plaintiffs the opportunity of trying the question. That objection, therefore, ought not to prevail.

Another objection occurred to the Court on hearing the case, namely, that the execution issued against Mr. Johnson was really not issued against him as a shareholder; but was only nominally against him, and really against the partnership effects. This is doubtful upon the affidavits. This point also may be tried. We apprehend that the scire facias against members, at the time of the contract being entered into, ought to state the prior execution against the members at the time of the execution, which is a condition precedent, and is necessary to warrant the scire facias against a member at the time of the contract being entered into; at all events, this might with probability be contended. On this ground, therefore, we should not refuse the rule.

The objection most relied upon by Mr. Watson and the Attorney General, and the other learned counsel who shewed cause on behalf of other persons was, that the plaintiffs had not made out a sufficient case of bonâ fide efforts to obtain the sum recovered from the members for the time being, the class primarily liable, to justify the Court in ordering a scire facias against a class, liable in the second degree. If

BANK of ENGLAND 5.
JOHNSON.

BANK OF ENGLAND

D.

JOHNSON.

an execution had issued quite recently, and had been ineffectual, the account of the present members is such as to justify us in concluding that no satisfactory result could follow from any efforts to obtain payment from them by execution against them, and therefore that a scire facias ought to issue against the former members. But it appears that two years ago, namely, in 1846, a fieri facias issued against one who is to be presumed to have been a then member, (otherwise the condition precedent of there being an execution against a member for the time being, would not have been performed), and that if the plaintiffs had then proceeded against other members then being, they might probably have recovered the amount. There were two, Messrs. Gibson and Rawson, who were then solvent, and who might have been proceeded against with a prospect of success. gives rise to a question of considerable nicety, namely, the true meaning of carrying into effect the anomalous provisions of an act of Parliament, by which those who are primarily liable at common law are made liable in the second degree, and those who at common law are not responsible at all, are made primarily liable; and on which an attempt is made to give a copartnership the quality of a corporation, while the individual responsibility of the partnership is preserved. To all these matters it is very difficult to apply the statute. It is said, and justly said, that the act requires the plaintiff to proceed upon his judgment at no particular time; he may wait for many years without losing his remedy, save as against members of the second class, who are not liable after three years from the time of ceasing to be so; and he might then undoubtedly proceed against members for the time being, who did not become such until long after the judgment; so that if the plaintiffs had just issued execution, and were now, immediately after it, applying for a scire facias, they would clearly be entitled to do so, and the shareholders, at the time of the contract, against whom this application is made, would be clearly liable, as these have lost nothing by the ineffectual execution against

Johnson, which the plaintiffs were not obliged to issue at the time they did so.

1849. BANK of ENGLAND JOHNSON.

It seems to us, however, that although the plaintiffs may sue out execution when they please, whenever they do so, they ought to try to make it effectual against all the then members for the time being; although the statute does not confine them to one execution, but they may have several against several members. It does not authorize them to select one, and then lie by and begin again; but if they begin their execution, they ought to go on with it with reasonable dispatch. Upon the present affidavits, no satisfactory reason is given why proceedings were not taken in 1846 against those who were the then members. If they had been, it is probable the defendants would never have been called upon at all; and, in the absence of proof of reasonable efforts at that time to obtain payment from the then members, we ought, we think, to follow the course adopted by the Queen's Bench, in the case of Eardley v. Law (a), and discharge this rule.

Rule discharged.

(a) 12 A. & E. 862; S. C. 4 P. & D. 379.

THOMPSON v. UNIVERSAL SALVAGE COMPANY.

LUSH had obtained a rule, calling on C. Lund, a share- On an appliholder in the Universal Salvage Company, to shew cause why the plaintiff should not be at liberty to issue execution had obtained

creditor who judgment

pletely registered company, for leave to issue execution against a shareholder, under the 7 & 8 Viot. c. 110, s. 68: *Held*, that that section applied to executions at the suit of creditors of the company, as well as at the suit of shareholders: but that a graditar caching the company as well as at the suit of shareholders: company, as well as at the suit of shareholders; but that a creditor seeking to avail himself of its provisions, must shew that he has first used all due diligence to obtain satisfaction from the assets of the company, before he will be allowed to proceed for the whole debt against an individual shareholder.

And that where the company had become insolvent, and its affairs had been referred to a Master in Chancery to be wound up, under the 11 & 12 Vict. c. 45, the creditor was bound to first prove his debt before the Master, and endeavour to obtain payment from the assets in the hands of the official manager, before he came to this Court for leave to issue execution against individual shareholders.

VOL. VI.

D. & L.

THOMPSON UNIVERSAL SALVAGE COMPANY.

against his property and effects, upon a judgment obtained against the company.

It appeared from the affidavits, that the company was completely registered under the provisions of the 7 & 8 Vict. c. 110, but not incorporated by act of Parliament or charter; nor was the liability of its members restricted by virtue of any letters patent. The plaintiff had obtained a verdict in an action against the company, and judgment had been signed thereon, on the 16th May, 1848. On the 25th of the same month, a fi. fa. was issued against the goods of the company, to which the sheriff returned nulla bona. The sum of 163l. 3s. 6d. still remained unpaid to the plaintiff; and it was expressed, as the deponent's belief, that any execution issued against the property and effects of the company would be unavailing, and that the only chance of obtaining satisfaction of the plaintiff's claim, was by proceeding against the individual members of the company. The name of C. Lund was inserted in one of the returns, filed by the company in the Registration Office, as having executed the deed of settlement on the 6th of February, 1846, as a shareholder; and no transfer of his shares had since been registered in the said office. an order of Vice Chancellor Knight Bruce, dated the 10th of November, 1848, under the 11 & 12 Vict. c. 45, the affairs of the company were referred to a Master in Chancery to be wound up, and an official manager appointed. The plaintiff had not proved his debt before the Master. On the 3rd of January, 1849, a summons for a Judge's order for execution, at the suit of the plaintiff, against C. Lund, was heard before Platt, B., at Chambers, who indorsed upon the summons-"No order-without prejudice to any application to the Court, by whom the question raised should, I think, be decided." The present application was accordingly made.

Phipson now shewed cause. This application should be disallowed. First, because the party making it is not

The mode of execution, given by the a shareholder. 7 & 8 Vict. c. 110, s. 68, does not extend to cases like the present. By the 66th section of that statute, power is given to the creditors of a completely registered company to issue execution against the person and effects of individual shareholders, in the event of their being unable, after the exercise of due diligence, to obtain satisfaction of their debt from the company. By the 67th section, persons, against whom execution shall have issued, are permitted to recover, in the first place, from the company, the amount of the loss they have sustained; and ultimately, in the event of their not obtaining full satisfaction, contribution from their co-shareholders for so much of it as remains unsatisfied. The 68th section then enacts. "that in the cases provided by this act for execution on any judgment," &c., "in any action or suit against the company, to be issued against the person, or against the property and effects of any shareholder, or former shareholder of such company, or against the property and effects of the company, at the suit of any shareholder or former shareholder, in satisfaction of any monies," &c. " paid or incurred by him as aforesaid, in any action or suit against the company, such execution may be issued by leave of the Court, or of a Judge of the Court, in which such judgment," &c., "shall have been obtained, upon motion or summons for a rule to shew cause, or other motion or summons consistent with the practice of the Court, without any suggestion or scire facias in that behalf; and that it shall be lawful for such Court, or judge, to make absolute or discharge such rule, or allow or dismiss such motion, (as the case may be), and to direct the costs of the application to be paid by either party, or to make such order therein as to such Court or Judge shall seem fit." The question then is, what is the meaning to be attached to the words "at the suit of any shareholder or former shareholder?" The natural construction seems to be, that they should be confined to cases where the action is

THOMPSON

D.

UNIVERSAL

SALVAGE

COMPANY.

THOMPSON

UNIVERSAL
SALVAGE
COMPANY.

brought against the company "at the suit of shareholders." Parke, B.—The Court of Common Pleas have decided differently; Peart v. The Universal Salvage Company (a)]. That Court did indeed so hold; but their judgment proceeded on the supposition that the 66th section applied only to executions on judgments, in actions at the suit of creditors. It is submitted, however, that the words of that section apply to all cases, as well of shareholders as creditors. The remedy given by the 68th section is peculiar, and designed to enable shareholders to re-coup themselves for any expenses they may have incurred, in any action against the company. [Alderson, B.—The meaning of the 66th, 67th and 68th sections appears to be this. By the 66th section, a creditor recovers judgment, and endeavours to obtain satisfaction of his debt by execution against the property of the company. If, after the exercise of due diligence he fail to do so, he may proceed against the person and property of the shareholders; and execution may be issued by the leave of the Court, or of a Judge, in the manner pointed out by section 68. Then by the 67th section, the person against whom execution shall have issued, is authorized to obtain reimbursement from the company. If he cannot get his money in that way, he must go to a Court of equity, to recover contribution from his co-shareholders. If you read the words in the 68th section, "at the suit of any shareholder," &c., as "on the application of;" and the expression "to recover" in the 67th, as "entitled to have;" it makes all clear. The obtaining reimbursement from the company is not a very beneficial proceeding, because the creditor must have exhausted the effects of the company before it can be had recourse to, and he obtains only a damnosa hæreditas; but probably he may be better acquainted with the assets, and where they are to be found, than the creditor.] But secondly, the plaintiff should not have sought satisfaction for his debt

under 7 & 8 Vict. c. 110, but have proved it in the manner pointed out by the 11 & 12 Vict. c. 45. The 5th section of that statute enacts, "that it shall be lawful for any person who shall be or claim to be a contributory of a company, to present a petition to the Lord Chancellor or to the Master of the Rolls in a summary way, for the dissolution and winding up, or for the winding up of the affairs of such company" in certain cases. By section 14, the Court is empowered to refer it to one of the Masters of the Court to wind up the affairs of the company. By the 20th and 22nd sections the Master is to appoint, first an interim, and subsequently an official manager, who is to make out a list of contributories, with their respective advances, and the number of shares to be attributed to each. By the 77th section, the list so prepared is to be settled by the Master, and previous notice of his being about to settle it, is to be given in the London Gazette. By section 83, the Master is authorized to make calls for the payment of the debts of the company on the contributories. By section 91, he may direct issues, special cases and actions to be brought; and by section 95, his orders are to have the effects of orders of Court. 73rd section then enacts, that "after the first appointment of an official manager, no creditor or other person shall, except so far as the Master shall permit, have power to commence or to proceed with any action against the official manager or against the company, or any other person representing the same, or who is sued as a contributory thereof, until after proof, or exhibiting or making such proof as he may be able, of his debt or demand before the Master, as hereinafter mentioned; and it shall be lawful for any Judge of the Court, in which such action shall be pending, upon summons taken out before him for that purpose, to order that all further proceedings in such action shall be stayed until after such proof shall have been made or exhibited before the Master." Now the present is clearly a proceeding in an action, and no proof as required has taken place. It was plainly the intention of the Legislature that each

THOMPSON

UNIVERSAL
SALVAGE
COMPANY.

THOMPSON

THOMPSON

UNIVERSAL
SALVAGE
COMPANY.

person should be made amenable, pari passu, with his co-shareholders to the payment of the debts of the company; and its object would be entirely defeated if execution were allowed to be issued against individual shareholders, as is sought to be done in the present instance.

Lush, in support of the rule, was directed to confine himself to the second objection. The 11 & 12 Vict. c. 45, was designed for the benefit of creditors of companies, and not for the protection of improvident speculators. Admitting that the word "action," in the 11 & 12 Vict. c. 45, s. 73, may be held to extend to proceedings by scire facias, still it refers only to such proceedings as are taken against companies that are not incorporated or completely The 58th section expressly provides that this act is not to affect the rights and remedies of creditors, whether contributories or not, against the company, or any of the contributories, or any existing contracts and engage-And the same appears from the 54th, 55th, and 60th sections. The 73rd section does not apply to all cases. Suppose an action of trespass, the Master could not take cognisance of that. The object of that section is to enable the Master to ascertain the amount of the debts of the company; and it, therefore, stops all actions for debts, until proof of them has been made. Here the amount of the debt has been ascertained by judgment recovered. The Court is not entitled to say to a creditor you must go into a Court of equity, unless the act renders such a course compulsory. [Alderson, B.—If it is within our discretion, and there is a tribunal which can administer full equity, why should we not refer you to that? It is admitted that the company have no assets to administer. [Alderson, B.— They have the property of the person whom you are anxious to make liable, you are seeking to get your debt from one when you are entitled to be paid by all.] Before proceedings could be taken in Chancery, all the solvent shareholders may have left the country.

PARKE. B.—I am of opinion that this rule should be discharged. The first question is, whether, since the passing of 7 & 8 Vict. c. 110, execution may issue against the property of a shareholder, without a suggestion or a scire facias at the suit of a party who is not a shareholder, and whether the Court of Common Pleas were correct in the decision to which they came in the case of Peart v. The Universal Salvage Company (a). The contest there was, whether the proceeding by scire facias or suggestion, on a judgment obtained against a company like this, was rendered unnecessary only in cases of actions by shareholders; and that Court decided, as I consider, correctly, that the provision was not confined to those cases. 68th section enacts, "that in the cases provided by this act for execution on any judgment, decree, or order in any action or suit against the company, to be issued against the person or against the property and effects of any shareholder, or former shareholder of such company, or against the property and effects of the company, at the suit of any shareholder or former shareholder, in satisfaction of any monies, damages, costs, and expenses paid or incurred by him as aforesaid in any action or suit against the company, such execution may be issued by leave of the Court, or of a Judge of the Court in which such judgment, decree, or order shall have been obtained, upon motion or summons for a rule to shew cause, or other motion or summons, consistent with the practice of the Court, without any suggestion or scire facias in that behalf." No doubt, the words "at the suit of any shareholder or former shareholder" may refer either to all or to the last antecedent. The Court of Common Pleas said, that it could not be considered as referring to all, for then the clause would become inoperative; and that the words must be taken therefore as being confined to the last antecedent. There seems at first, however, an apparent absurdity in the latter view; for then the individual shareholders who have THOMPSON B.
UNIVERSAL SALVAGE COMPANY.

THOMPSON v.
UNIVERSAL SALVAGE COMPANY.

recovered in an action against a joint stock company, must apply to the Court for leave to issue execution. would certainly be the effect of such a construction, if its shareholders had power to sue the company; but, taking the 67th and 68th sections together, the meaning of the Legislature, in saying that the shareholder, who has been compelled to pay the debt of the company, may "recover" against the company, is not that he shall have an action against the company and execution on it; but that if he should be called on to pay the debt of the company, he should be enabled by leave of a Judge to obtain compensation from them by means of an execution. The result therefore is, that the 68th section is not restricted to applications at the suit of shareholders only; but to all applications by creditors of the company, whether shareholders The Court or Judge, in granting an application for execution under this section, will exercise the same discretion as if the motion were for a scire facias; that is, they will see that the party against whom the application is made is a shareholder, and that he is legally bound to pay. On an application for execution like the present, there is a duty imposed on the creditor by the 66th section. may have immediate execution against the property and effects of the company without any restraint; but when he demands permission to issue execution against an individual shareholder of the company for the whole sum, it will only be conceded to him where he has exercised due diligence in first endeavouring to obtain satisfaction from the property and effects of the company. If he has done so, then the Court may allow him to proceed against the property and effects of the individual shareholders; but the question will always be, whether due diligence has been used to obtain satisfaction from the primary fund. Then comes the stat. 11 & 12 Vict. c. 45, which puts an insolvent company in an entirely different position. It directs that the affairs of the company shall be placed under a Master in Chancery, who is to collect the debts of the company, and be em-

powered to compel each individual, liable to contribute, to contribute, and in that manner form a fund for the payment of the partnership debts. The 73rd section renders it necessary that all the creditors of an insolvent company should, in the first instance, prove their debts before a Master in Chancery, and endeavour to obtain payment through him. If that prove abortive, then the Court will allow the creditor to proceed directly against the individual persons liable to We will therefore exercise our discretion in granting such an execution; but I think that, by the true construction of the 11 & 12 Vict. c. 45, so long as there is any reasonable hope of obtaining payment by means of its machinery, it is our duty to prevent individual creditors being called on to make good the debts of the company. We ought, therefore, to stay proceedings, where an execution has issued out against shareholders under such circumstances; and to prevent any such issuing, as that for which the present application is made.

ALDERSON, B.—I am entirely of the same opinion. The first point has been so amply discussed, that it will be quite superfluous to make any further observations on it. respect to the last, it is perfectly clear that the plaintiff is not entitled to proceed against the shareholders; for he has not used due diligence to obtain his debt from the assets of the company. It is plain that if, by the 11 & 12 Vict. c. 45, s. 73, he is in a position under the authority of a Court of Chancery to prove his debt, we have the power to When he has so done, his stay proceedings until he does. next duty is to obtain payment from the assets in the hands of the official manager; so that he is entitled to enforce his claim on a fund composed as well of the funds of that very person against whom he is now anxious to proceed in this Court, as of those of the other members of the company. It would be unjust, therefore, to permit the plaintiff to proceed against this individual shareholder, as long as the funds of the company remain unexhausted. If he has used

1849. Thompson

Universal Salvage Company.

1849. THOMPSON diligence to obtain satisfaction from that source without success, then we may assist him.

UNIVERSAL SALVAGE COMPANY.

Pollock, C. B., and Platt, B., concurred.

Rule discharged, without costs.

DAWSON v. WRENCH and Others.

Assumpsit. The declaration stated that the plaintiff made a policy of insurance with the General Maritime the goods, body, tackle,

ASSUMPSIT on a policy of insurance. The declaration stated that the plaintiff made a policy of insurance with the General Maritime Company upon the goods, body, tackle, apparel, &c., of the Cumberland, the ship being valued at 5000l.; that the ship and freight were Company upon warranted free from average under 3L per cent., unless

apparel, &c., of a certain ship, the ship being valued at 5000%; that the ship and freight were apparel, &c., of a certain snip, the snip being valued at 50002; that the snip and freight were warranted free from average under 32 per cent. unless general, or the ship were stranded; that the policy also provided that the capital, stock and funds of the said company should alone be liable to make good all claims and demands under that policy, and that no proprietor of the company should be subject to any demands, nor be in anywise charged by reason of that policy, beyond the amount of his share in the stock of the company, it being one of the original rules of the company that the responsibility of individual proprietors should be limited to their shares in the serviced stock in witness whereas for the amount of 15002, the defendants thereupte set in the capital stock, in witness whereof, for the amount of 1500L, the defendants thereunto set their hands; and that it was signed by the three defendants as directors. Mutual promises. It then stated that the ship having run aground, it was necessary to throw over two of the anchors, and cut away the cables from them, and that the same were left in the sea, and lost to the plaintiff; that the ship was further injured, and that the masts, ropes, &c., were lost. First breach, that by reason of the said loss of the anchors and cables, the plaintiff sustained a general average loss to a large amount. Second breach, that by reason of the ship being strained and damaged, the plaintiff sustained an average loss on the ship, her masts, ropes, and cables, to a greater amount than 3*l*. per cent. on all the moneys insured thereon, to wit, to the amount of 50*l*. by the hundred for each hundred, whereby the company became liable to pay a certain sum. Breach, no repayment, though sufficient funds.

Third place that the said and th

Third plea, that the said anchors and cables were not left in the sea and lost.

Fourth plea, to so much of the declaration as alleges that the plaintiff has suffered an average loss on the said ship, &c.; the defendants say that the plaintiff has not suffered an average loss on the said ship or vessel on her masts, ropes, and cables, to the amount of 3l. per cent, on all moneys insured thereon.

Held, on special demurrer, that the pleas were bad, as offering too large traverses.

Held also, that the declaration disclosed a good cause of action against the defendant; but that the second breach was bad, as it did not distinctly state the value of the ship, and shew that the amount of loss sustained exceeded 3L per cent. on that value; and therefore, that the

defendant was entitled to judgment on that breach.

Where a declaration contains several breaches, some of which are good, and the others bad, and there is a general demurrer, judgment should be given for the plaintiff on the good, and for the defendant on the bad, breaches.

general, or the ship were stranded; that the policy also provided that the capital, stock, and funds of the said company should alone be liable to make good all claims and demands under that policy, and that no proprietor of the company, his heirs, &c., should be subject to any demands, nor be in anywise charged by reason of that policy, beyond the amount of his share in the stock of the company, it being one of the original and fundamental principles of the company that the responsibilities of the individual proprietors should, in all cases, be limited to their shares in the capital stock; in witness whereof, and that the company were content with that assurance for the sum of 1500L, the defendants thereunto set their hands. The declaration then averred that by a memorandum the company became insurers to the plaintiff for the sum of 1500L, and proceeded to allege that the policy was signed by the three defendants as directors of the company, and that in consideration of the payment of the premium at their request, and of the promise of the plaintiff to observe all things in the policy, on his part, to be performed, the defendants undertook that the company should perform all things in the policy to be performed by them. It then went on to state that the ship set sail; that she ran aground; that it was necessary for her safety to let go the larboard bower anchor, and the kedge anchor; that the same could not be weighed again; that it became necessary to cut away the cables from the said anchors, and that the anchors and cables being, to wit, of the value of 100%, were left in the sea, and lost to the plaintiff; that afterwards the ship was further greatly strained, damaged, and broken, and that the masts, ropes, and cables of the said ship were lost to the plaintiff. The declaration then alleged, as the first breach, that by reason of the said loss of the anchors and cables, the plaintiff sustained a general average loss to a large amount, to wit, &c.; and, as the second breach, that by reason of the ship being strained and damaged, the plaintiff sustained an average loss or damage on the said

DAWSON

DAWSON

WRENCH

and Others.

DAWSON

DAWSON

WRENCH

and Others.

ship or vessel, her said masts, ropes and cables, to a larger amount than 3L per cent. on all the monies insured thereon, to wit, to the amount of 50L by the hundred for each and every hundred thereon; whereby the said company became liable to pay to the plaintiff a certain sum of money, to wit, 200L, being their proportion of the last-mentioned average loss in respect of the said sum of 1500L Breach, non payment, though the funds were sufficient.

Third plea, that the said anchors and cables were not left in the sea and lost, modo et formâ.

Fourth plea to so much of the said first count as alleges that the plaintiff has suffered an average loss on the said ship or vessel, her masts, ropes, and cables, to a larger amount than 3L per cent. on all the monies insured thereon; the defendants say, that the plaintiff hath not suffered an average loss on the said ship or vessel, her masts, ropes, and cables, to the amount of 3L per cent. on all the monies insured thereon, modo et formâ.

Special demurrer to the third plea, on the ground that the traverse was too large; and to the fourth plea, on the ground that the introductory part and the body of the plea were inconsistent, the traverse being larger than the introductory part; and that the traverse itself was too large. Joinders in demurrer.

Donodeswell, in support of the demurrers. The pleas are bad. [Parke, B.—The pleas are certainly bad, on account of their offering too large a traverse; Goram v. Sweeting (a)]. He was then stopped by the Court, who called upon

Montague Smith, to support the pleas. It must be conceded that the pleas cannot be sustained, but the declaration is also bad, since it discloses no cause of action. The very object of the policy is to prevent the individual shareholders from being personally charged, and to make

the funds of the company alone liable. The alleged promise, therefore, is not such as the law would imply, and is consequently void. [Parke, B.—The declaration alleges that the policy was signed by the three defendants as directors. and that in consideration of the payment of the premium at their request, and of the promise of the plaintiff to observe all things on his part, the defendants promised to perform all things in the policy to be observed by the There is also an averment that the funds were Surely that will do]. Dowdeswell referred to sufficient Andrews v. Ellison (a), and Gurney v. Rawlins (b). [Parke, B. —We have before held that there was a personal undertaking by the persons executing the policy to perform it; no one would otherwise insure with them]. At any rate the second breach is bad. The clause in the declaration is, that the ship and freight are warranted free from average, under 3L per cent, unless general, or the ship was stranded. The breach, however, is, that the plaintiff sustained an average loss on the ship, her masts, and cables, to a larger amount than 3L per cent., on all the monies insured Now 31. per cent. on the sum insured would or might be under 3L per cent. on the value of the vessel, and the breach is therefore incorrectly laid, as it is possible that consistently with that, the loss on the ship and freight together might have been under 3L per cent. on its value, which is 5000L

Doudeswell, in reply, was directed to confine his argument to the second breach. The second breach is good. Matter, when material, though stated under a videlicet, on demurrer, is assumed to be correct; Dakin's case (c); Whitaker v. Harrold (d); Nightingale v. Wilcoxson (e). Now the declaration alleges that the plaintiff sustained an

DAWSON

DAWSON

WRENCH
and Others

⁽a) 6 Moore, 199.

⁽d) 11 Q. B. 163.

⁽b) 2 M. & W. 87.

⁽e) 10 B. & C. 202; S. C. 5 M.

⁽c) 2 Wms. Saund. 290 b, 6th & R. 169. ed.

DAWSON
v.
WRENCH

average loss on the ship to a larger amount than 3L per cent. on all the monies insured thereon, to wit, to the amount of 50L by the hundred, on every hundred insured thereon. If that be taken in connexion with the sum stated as the value of the ship, a loss is shewn exceeding 31. per cent.; for 50L on every 100L of 1500L exceeds 3L per cent. on 5000L; and the breach is therefore properly laid. [Parke, B.—In the case of Irving v. Manning (a), it was decided by the House of Lords, that in estimating whether there is a total or a partial loss, the value mentioned in the policy was to be disregarded, confirming the judgment in Lewis v. Rucker (b). Admitting, therefore, that the sums stated in the declaration are material, still the amount of the loss does not appear. Pollock, C. B., referred to Allen v. Sugrue (c)]. The intention of the parties in inserting a valuation is to ascertain the extreme amount to which the insurers shall be liable, and to afford a basis for calculating these very averages. The parties to the policy, therefore, must be taken to have agreed that 5000L should be the basis on which the amount of loss should be calculated under the memorandum. But, further, the memorandum relative to the 3L per cent. must be taken as a proviso. If the plaintiff shews a loss, and the defendants intend to reply on the proviso, it is for them to plead it, and shew that they come within the exemption. The statement of this, therefore, in the declaration, was superfluous, and might be rejected; Latham v. Rutley (d). But in any case the plaintiff is entitled to judgment, as the declaration is only attacked on general demurrer, which as one breach is good, is too large. If he had signed judgment by default generally, and general damages had been assessed thereupon, it would have been good. [Parke, B.-How can we give you judgment on a bad breach, to which this is pleaded, assum-

⁽a) 6 C. B. 391; S. C. 13 C. & R. 9. & F. 287. (b) 2 Burr. 1167. (c) 2 Burr. 1167. (d) 2 B. & C. 20; S. C. 3 D.

⁽c) 8 B. & C. 561; S. C. 3 M.

ing it to be bad? If there were a general demurrer to this declaration, must we not have given judgment for the defendants on this breach? If a declaration contain two counts, one of which is good and the other bad, judgment will be given for the plaintiff on the good, and for the defendant on the bad count; and from a note of my Brother Manning, in the case of Hinde v. Grey (a), it appears that a similar rule is applicable to breaches as to counts.] If the breach be bad, the plea is a plea to something immaterial; and if a party traverses or pleads to that which forms no substantive part of the cause of action, judgment must be given against such a plea. The demurrer here is to the plea, not to the declaration; and even had the defendants demurred generally to the declaration, it may be doubted whether judgment must not have been given generally for the plaintiff; for it cannot be denied that if general damages had been assessed on a judgment by default, such assessment would have been good.

DAWSON
v.
WRENCH

M. Smith replied.

PARKE, B.—The portion of the contract referring to the 3L per cent. is not a proviso, but a warranty. The plea is decidedly bad, as offering too large a traverse. The first breach of the declaration is good. On the second breach my mind is not entirely made up. The question is, whether the assigned value must be taken to be the real value. On this point we will take time to consider.

Cur. adv. vult.

Pollock, C. B., now delivered the judgment of the Court.—This case, which was argued before us a few days since, was an action on a policy of insurance. It contained two breaches, and the case stood over for consideration with reference to the second. In respect to the first breach, the

DAWSON

DAWSON

WRENCH

and Others.

Court intimated at the time a clear opinion that the plaintiff was entitled to the judgment of the Court. With respect to the second breach, the objection of Mr. M. Smith was, that it did not appear that the average loss exceeded 3L per cent. upon the sum that was to be considered the value of the article. Mr. Dowdeswell contended that with reference to the averments, and calculating also the value given to the insurance in the policy, and the statement of the value of the articles lost, and coupling them together, there was a sufficient averment, or that it sufficiently appeared in the declaration, that the loss was more than 3L per cent. on the value of the article. On consideration, we think that that argument is not tenable, and that the defendants are entitled to our judgment upon the second breach; and for this plain and short reason, that it is no where distinctly averred that such was the value as to make the loss more than 3L per cent. It is true, the value, as agreed on in the policy, is stated in the declaration; and possibly under some circumstances that valuation, as between the parties, would be some evidence that such was the value; but a statement of evidence is not equivalent to an averment of a fact. We think it necessary that the facts should be averred; and it is not sufficient to state something from which, under some circumstances, between these parties, by possibility, the jury might be induced to find the fact for which Mr. Dowdeswell contended. The judgment of the Court, therefore, will be for the defendants upon the second breach.

Judgment accordingly.

1849.

GABARDI v. HARMER.

GREENWOOD moved to set aside a judgment which To an action had been signed in the above case for want of a plea. appeared that this was an action of trover. The defendant, having taken out a summons for leave to plead several pleas, of which matters, delivered to the plaintiff the following abstract of was the abthe proposed pleas;—first, not guilty; secondly, not possessed; and thirdly, accord and satisfaction; and subse-secondly, not quently obtained an order from a Judge at Chambers to thirdly, accord plead those pleas. Upon the pleas themselves being delivered, the third plea appeared to be one of accord and satisfaction "after action brought;" upon which the plaintiff delivered, the signed judgment.

There is no substantial variance between the abstract and the pleas delivered. In the Index to Chitty on Pleading, and under the head "Accord and Satisfaction," a reference to the form of a plea of accord and satisfaction after action brought, is to be found. [Parke, B.—You ought to have stated that it was a plea of accord and satisfaction "after action brought," in your abstract. Alderson, B.—You have obtained permission to plead this plea, by reason of your incorrectness]. rate, the proper course to have adopted, was not to sign judgment, but to move to strike out the plea; Flight v. Smale (a); Holliday v. Bohn (b). [Alderson, B.—The latter case was not under the statute of Anne. You cannot distinguish the present case from that of a defendant pleading a non-issuable plea where he is under terms to plead issuably. You have obtained permission to plead a certain plea, upon condition that it corresponds with the abstract. You

It defendant obto plead three the following stract; first, not guilty; and satisfacthe pleas themthird plea ap-peared to be one of accord and satisfaction "after action brought." The plaintiff thereupon signed judgment. Held regular.

⁽a) 4 C. B. 766.

⁽b) 3 M. & G. 115; S. C. 3 Scott, N. R. 496.

1849. GABARDI HARMER.

The plea was have neglected to observe the condition. therefore pleaded without leave. Parke, B .- You leave out in your abstract the very point which the Judge was called on to decide. If the real nature of the third plea had been disclosed, it would probably not have been allowed with the other two (a)].

PER CURIAM (b).

You may take a rule upon your affidavit of merits, and payment of costs; otherwise the rule must be refused.

(a) See Suckling v. Wilson, ante, vol. 4, p. 167. This case was questioned, but upheld in Challis v. Higgs, (Q. B. Trin. Term, 1848, not reported); where the Court of Queen's Bench, after time taken to consider, made absolute a rule to rescind a Judge's order, allowing pleas of payment and release since action brought, together with pleas of the general issue and set-off. T. Jones, in support of the rule. Rew, contrà.

(b) Pollock, C. B., Parke, B., Alderson, B., and Rolfe, B.

THE SHROPSHIRE UNION RAILWAY and CANAL COMPANY v. ANDERSON.

By a special act incorpo-rating a railway company, it was enacted. that all the provisions of the 8 & 9 Vict. c. 16, with respect to

T. JONES had obtained a rule, in this case, for leave to plead two pleas, which had been disallowed by Rolfe, B.

The action had been brought by the company against the defendant as a shareholder, and the declaration was in the form required by the 26th section of the Companies'

certain matters should, so far as they were applicable, and not inconsistent with the provisions of that act, be incorporated with it. By the 67th section, the company were empowered to raise a certain sum by the creation of new shares, upon such terms and in such manner as might be agreed upon at a general meeting specially convened. To an action for calls, in the form given by the 8 & 9 Vict. c. 16, s. 26, the Court refused to allow the defendant to plead, in addition to never indebted, a denial of his being a shareholder, and that no calls had been made, the following pleas, namely, that there had been no meeting of the company before the shares were created, and that the shares were not agreed to be created at a meeting of the company.

Held also, that the word "shareholder" in the 8 & 9 Vict. c. 16, ss. 26 and 27, means a share-

holder de jure, and one entitled to participate in the profits.

Clauses Consolidation Act, 8 & 9 Vict. c. 16; stating that the defendant was a shareholder, and was indebted to the company in a certain sum for calls on the shares which he held; whereby an action had accrued to the company, by virtue of that act, and the special act incorporating the The special act was 9 & 10 Vict. c. cccxxii., company, &c. and it enacted that all the provisions of the Lands' Clauses Consolidation Act, with respect to certain matters, viz., the appointment and rotation of directors; the powers of the directors, and the powers of the company to be exercised only in a general meeting; the proceedings and liabilities of directors; the distribution of the capital of the company into shares; the transfer or transmission of shares; the payment of subscriptions, and the means of enforcing the payment of calls; the forfeiture of shares for non-payment of calls; the remedies of creditors of the company against the shareholders; the borrowing of money by the company on mortgage or bond, and the conversion of the borrowed money into capital should, so far as they were applicable, and were not modified by this act, or inconsistent with its provisions, be incorporated with this act. By the 67th section, the company were empowered to raise, by the creation of new shares, other than the shares thereinbefore authorized to be created by them for the purposes of that act, the sum of 1,000,000L, in addition to any monies which they were then authorized to raise, upon such terms, and in such manner as might be, or might have been agreed upon at any general meeting of the company, specially convened for that purpose.

The defendant proposed to plead five pleas: first, never indebted; secondly, a denial of his being a shareholder; thirdly, that no calls had been made; fourthly, that there had been no meeting of the company before the shares were created; and, fifthly, that the shares were not agreed to be created at a meeting of the company. The last two were the pleas which had been disallowed.

SHROPSHIRE UNION RAILWAY and CANAL

COMPANY

v.

Anderson.

SHROPSHIRE
UNION
RAHLWAY
and CANAL
COMPANY
To
ANDERSON.

This is an action for calls, founded Bovill shewed cause. on the 8 & 9 Vict. c. 16, s. 26 (a). By the 27th section, what is necessary to be proved by the plaintiffs is pointed out, viz., that the defendant, at the time of making the call, was a shareholder; that the call was in fact made; and that due notice thereof had been given. The pleas, therefore, which are now sought to be added, should not be allowed. If the defendant was a shareholder, he may have received the dividends out of the profits; and now, on being sued, he ought not to be permitted to say that the shares were not properly created. The Legislature has pointed out what defences a party sued is entitled to raise; and if he seeks to obtain more, then he applies to the discretionary power vested in the Court by the Statute of Anne. many authorities to shew that, in the exercise of that power, the Court will refuse to sanction the placing on the record

(a) 8 & 9 Vict. c. 16, s. 26. "That in any action or suit to be brought by the company against any shareholder to recover any money due for any call it shall not be necessary to set forth the special matter, but it shall be sufficient for the company to declare that the defendant is the holder of one share or more in the company (stating the number of shares), and is indebted to the company in the sum of money to which the calls in arrear shall amount in respect of one call or more upon one share or more (stating the number and amount of each of such calls), whereby an action hath accrued to the company by virtue of this and the special act."

Sect. 27. "That on the trial or hearing of such action or suit it shall be sufficient to prove that the defendant at the time of

making such call was a holder of one share or more in the undertaking, and that such call was in fact made, and such notice thereof given as is directed by this or the special act; and it shall not be necessary to prove the appointment of the directors who made such call, nor any other matter whatsoever; and thereupon the company shall be entitled to recover what shall be due upon such call, with interest thereon, unless it shall appear either that any such call exceeds the prescribed amount, or that due notice of such call was not given, or that the prescribed interval between two successive calls had not elapsed, or that calls amounting to more than the sum prescribed for the total amount of calls in one year had been made within that period."

of such pleas. In The London and Brighton Railway Company v. Wilson (a), the Court of Common Pleas refused to allow any other pleas than that the defendant was never indebted, and not a proprietor. In The London and Brighton Railway Company v. Fairclough (b), a similar decision was come to. And these cases were afterwards recognised and acted upon by the Court of Queen's Bench, in The South Eastern Railway Company v. Hebblewhite (c). But, further, if there was no meeting before the shares were created, then the defendant was never a shareholder under the act, and may shew that fact under either of the pleas already allowed.

1849.
SHROPSHIRE
UNION
BAILWAY
and CANAL.
COMPANY
**.
ANDERSON.

T. Jones, in support of the rule. If the Court is of opinion that the subject-matter of the disputed pleas may be given in evidence, under any of the traverses already granted, that will be quite satisfactory, and the question need not be further discussed. But that is doubtful. Under the provisions of the 8 & 9 Vict. c. 16, s. 27, such a defence, it seems, would not be admissible. By that clause, it would be only necessary for the plaintiff, to prove that the defendant was a shareholder de facto. By the 67th section of the Special Act, the shares must be created at a general meeting, holden for that purpose. By taking both acts together, this is a defence to which the defendant would be entitled. [Alderson, B.—It is quite clear that if you deny that a party is a shareholder, you will deny all that the act requires to be done in order to render him one; and if so, cadit quæstio]. The two acts must be read together. [Alderson, B.—If the clause in the special act qualifies the general act, then you may give the matter in evidence under a traverse of your being a shareholder; if not, then the Legislature did not intend to give you any benefit from it.]

⁽a) 6 Bing. N. C. 135; S C. 8 Dowl. 278; 8 Scott, 540. 8 Scott, 347; 8 Dowl. 40. (c) 12 A. & E. 497; S. C. 4 P. (b) 6 Bing. N. C. 270; S C. & D. 246.

SHROPSHIRE
UNION
BAILWAY
and CANAL
COMPANY
ANDERSON.

Pollock, C. B.—I am of opinion that this rule should be discharged. It is an appeal from a decision of my Brother Rolfe, who refused, at Chambers, to permit certain pleas to be placed on the record. And, I think, that he was quite right in the conclusion at which he arrived. Generally speaking, if any doubt be entertained on the subject, the pleas which it is proposed to plead should be allowed; but if none be felt, then we ought not to admit them, merely because the Judges of another Court might possibly adopt a different view from that which we take. If such a course were followed, I do not know why any plea should be admitted or struck out, until the House of Lords had pronounced it to be valid or invalid. The rule which ought to prevail is to allow more than one count or plea, if there be reasonable ground for believing that by its refusal a plaintiff or defendant would endure hardship. the purpose of the defendant, in pleading the proposed pleas, be to object to some matter of form, it is clear that the general act intended to exclude such a mode of defence. If, on the other hand, the defence be of such a nature as would shew that the defendant was not a shareholder in the company, the Legislature did not mean to exclude it. the latter be the one contemplated, it may be taken advantage of under the traverses already allowed.

Parke, B.—I am of the same opinion. With respect to the admissibility of the subject-matter of the proposed pleas under either of the others as they stand, I think it is admissible; for if the clause in the special act has the effect of preventing parties from sharing in the profits in the company, except on shares created at a general meeting, the fact, that the shares were not so created, may be given in evidence under the traverse of the defendant's being a shareholder; for I consider that the meaning of the Legislature was, that only those persons should pay calls who were entitled to share in the profits. With respect to the allow-

ance of pleas, the rule usually adopted has been this: if the matter is perfectly clear, and if all the Courts have held that the defence might be given in evidence under certain pleas, a special plea, embodying that matter, should be refused; if, however, any reasonable doubt exist, it should be permitted. It is true, that until finally settled by the House of Lords, it cannot be perfectly clear that a plea is good or bad; but where all the Courts are agreed respecting its invalidity, it should be excluded. Here I concur in the view expressed by the rest of the Court, that the additional defence sought to be raised, is admissible, either under the plea of not indebted, or never a shareholder.

1849. SHROPSHIRE UNION RAILWAY and CANAL COMPANY ANDERSON.

ALDERSON, B.—I am of the same opinion. I think that the 8 & 9 Vict. c. 16, s. 27, meant that a shareholder should be such de jure, and one entitled to participate in the profits. A denial, therefore, of being a shareholder, would enable a defendant to shew that he was not such an one as would be entitled to share in the profits. I do not mean to say, however, that an individual who is a holder of shares, not created at a general meeting, is not possibly, under this special act, a shareholder de jure, and entitled to the profits of the speculation.

PLATT, B., concurred.

Rule discharged.

CRAIG and Another v. LLOYD.

A RULE had been obtained on the part of the plaintiffs, An affidavit calling on the defendant to shew cause why a rule obtained of an event, as in this case for a special jury should not be discharged, and "the 19th of in this case for a special jury should not be discharged, and why the cause should not be tried in its turn by a common month of Jajury; against which,

this present nuary." Held that the jurat

looked to, to see that the month of January, 1849, was intended (a). (a) See Holmes v. The London and South Western Railway Company, post, p. 536.

CRAIG and Another v. LLOYD,

Sir J. Jervis (Attorney General) was proceeding to shew cause, when

Watson, contrà, objected to the affidavit made by the clerk of the defendant's attorney, on the ground that the date of a particular event was not given with sufficient distinctness in the body of it. The language employed was, "the date of such sittings is the 19th of this present month of January." The jurat was in the usual form; and if that could be referred to, it certainly would appear that the month of January, 1849, was intended. He stated, however, that he had understood that the Court of Queen's Bench had recently decided that such affidavits were invalid (a).

PARKE, B.—We have no authentic information of any such decision. In the absence, therefore, of all authority to the contrary, I think that we should hold that this affidavit is good. In order to ascertain to what period "this present month of January" refers, the jurat may be examined; and on doing so, we find that it is the month of January, 1849. The objection cannot prevail.

The rest of the Court concurred.

The rule was subsequently made absolute on the merits.

(a) Semble, Foster v. Tattersall, post, p. 537, note (a).

1849.

THRISCUTT v. MARTIN and Others.

The first count of the declaration stated that A declaration theretofore, to wit, before and on the day and year next that theretothereinafter mentioned, John Trevanion Parnell Bettesworth J. T. was pos-Trevanion was possessed of one undivided moiety, (the sessed of an whole into two equal moieties to be divided), of certain moiety of cerwaste land, situate in the county of Cornwall, called tain land, as tenant in com-Treverbyn Common, as tenant in common thereof with mon with his late Majesty, his late Majesty King William the Fourth, his said late as Duchy of Cornwall; Majesty then being possessed of the other undivided moiety of the said land in right of his Duchy of Cornwall; and possessed by a certain inbeing so possessed, the said J. T. P. B. Trevanion, to wit, denture, made between the on the 16th day of November, 1833, by a certain indenture said J. T. and made between the said J. T. P. B. Trevanion of the one part, the said J. T. and the plaintiff of the other part, did grant to the plaintiff, full and free liberty, power, and authority to dig, work, and search for China clay, in and through all the said away the clay undivided moiety of the said grantor, of and in a certain parcel of the parcel of the said waste land therein particularly described; said land, and to make adits, and such clay, when found there to raise, wash, cleanse, pits, &c., for and make merchantable, and fit for sale; and the same to effectual exerconvert and dispose of to his the plaintiff's own use, and at liberties so his will and pleasure; and within the said undivided moiety granted, &c., for the period of the parcel of waste land so described as aforesaid, to of twenty-one make, convey, and bring such adits, pits, drifts, leats, went on to waters, and watercourses, and to erect such sheds, engines, aver that there and other buildings as he, the plaintiff, should think neces-time divers sary and convenient, for the more effectual exercise of the in the said

undivided the plaintiff, granted to the plaintiff the liberty to dig for and carry in a certain were at the clay pits, &c. land, and certain leats, &c

necessary for washing, &c., the said clay; that after the plaintiff had become so entitled, and had begun to enjoy the said liberties under the said grant, with the assent of the tenant in common, the defendant intending, &c., wrongfully obstructed the plaintiff in the use of the said liberties. &c., by destroying certain dams, &c., lawfully erected upon the said land, and diverted the said leats, &c.; whereby the plaintiff was deprived of the benefit of the several liberties so granted to him, &c.: Held, on special demurrer, first, that the title of the plaintiff being pleaded by way of inducement only, an averment of his seisin in fee was unnecessary. Secondly, that the deed referred to in the declaration, not forming the foundation of the plaintiff's title, profert of it was not required. Thirdly, that the breach was sufficiently laid. Fourthly, that the consent of the co-tenant being immaterial, it was not necessary that it should be shown. THRISCUTT

D.

MARTIN

and Others.

liberties, powers, and authorities thereby granted: to have, hold, use, exercise, and enjoy the said liberties, powers, and authorities aforesaid, unto the plaintiff, his executors, administrators, and assigns, from the 29th of September then last past for the term of twenty-one years thence next ensuing, subject to all prior and subsisting grants, if any; he, the plaintiff, his partners, co-adventurers, administrators, or assigns, paying therefore during the said term to the said grantor, his heirs or assigns, or other person entitled, for the time being, to the reversion, freehold, or inheritance, of the said undivided moiety of the parcel of waste land so described as aforesaid, certain yearly sums of money, therein more particularly set forth. It then proceeded to aver, that at the time of the making the said grant, there were and thence continually have been within the parcel of waste land so described in the said grant as aforesaid, divers China clay pits and beds of China clay, and certain leats or streams of water necessary and convenient for washing, cleansing, and making merchantable the said clay; yet, that whilst the said grant was in full force and effect, and in no way determined or made void, and during the said term of twenty-one years therein specified, and after the plaintiff had so become entitled as aforesaid to use, exercise, and enjoy the liberties, powers, and authorities in the said indenture specified, and had in fact begun to use, exercise, and enjoy, and was actually using and exercising, and enjoying the same, by and under the said grant, and by and with the assent and permission of his late Majesty, King William the Fourth, and of our sovereign Lady, the now Queen, and of his Royal Highness Albert Edward, the now Duke of Cornwall, respectively, being successively tenants in common of the said waste lands, with the said grantor in right of the said duchy of Cornwall, to wit, on the 1st day of September, 1847, and on divers other days between that day and the commencement of this suit, the defendants intending to injure the plaintiff, wrongfully obstructed and disturbed the plaintiff in the use,

exercise, and enjoyment of the said liberties, powers, and authorities, to wit, by destroying certain dams, hatches, shafts, and other works, lawfully and necessarily erected and made, in and upon the said parcel of waste land, for the enjoyment and working by the plaintiff of the said clay pits and beds of clay, and filled in and diverted the said leats or streams of water lawfully and necessarily used by the plaintiff in and about his clay pits and clay works, and in and about the working, washing, cleansing, and making merchantable the said China clay, which he was so entitled to dig, work, and raise as aforesaid: by means whereof the plaintiff was, during all the time aforesaid, deprived of the benefit of the several liberties, powers, and authorities so granted to him as aforesaid, &c.

Special demurrer and joinder. The points marked for argument on the part of the defendant were the following: that the plaintiff having assumed to set out his title to the liberties and authorities in the first count mentioned, ought to have pleaded such title correctly, and according to its legal effect; that no sufficient title is shewn to the liberties and authorities claimed by the plaintiff; that the plaintiff ought to have made profert of the indenture; that the allegation that Trevanion was possessed, if meant as an averment of title is bad for uncertainty, and if meant as an averment of possession, is an insufficient foundation for the grant alleged to have been made; that the title out of which a particular estate is derived ought to be shewn; that the averments relating to the consent of the Duke of Cornwall are uncertain, and are not properly pleaded to shew title from the Duke; that the allegation of obstruction is uncertain, and it cannot be known with sufficient certainty from the declaration what rights the plaintiff claims, or what rights he means to say are obstructed, and that the said first count is bad for want of certainty.

The plaintiff's points were, that the indenture being mere inducement, or merely superfluous, need not be pleaded with profert; that the plaintiff's title being inducement, THRISCUTT

MARTIN
and Others.

THRISCUTT

o.

MARTIN
and Others.

need not be stated, nor need the title under which he claims be stated with greater certainty than is stated in the declaration; that possession is a sufficient foundation for the grant alleged, and that a mere wrong doer cannot put the plaintiff to proof of the origin or legality of his title, or to a regular deduction of it; that a title to a moiety is a sufficient ground of action as against any one not claiming under the covenants; that the alleged assent of the co-tenant is immaterial and surplusage, and, if necessary, it is sufficiently stated that such assent may be by parol; that entry by mere assent of the landowner is enough to support an action of tort against a third person; that all title, except the actual use of the liberties referred to in the declaration, is surplusage, such user, or inception of user, being enough as against a wrong doer; that the title of the plaintiff to the clay pits, &c., does sufficiently appear, they being on the land of the grantor, and being things included directly, or by necessary implication in the said grant, and being necessary to the enjoyment of the liberties of which the plaintiff was actually possessed; that the obstruction is shewn with certainty; that an averment that the plaintiff began to use the liberties granted to him is unambiguous, and implies an entry on the land; and further, that an entry and working, in virtue of such liberties, distinctly appear in the declaration; that plaintiff's title to the dams, and other works referred to, sufficiently appears, and need not be more particularly stated; and that the right to make them, passed with the liberties alleged to be granted, and was incidental thereto, and connected therewith. The Court called upon

Smirke to support the declaration. The declaration is good. In actions for the disturbance of a right it is not incumbent on the plaintiff to state his title. It is sufficient if he declares on his possession; note to Coryton v. Lithebye (a). [Parke, B.—Is there any authority to shew that when a

⁽a) 2 Wms. Saund. 113 a, n. (1), 6th ed.

party's title is founded on a deed he can plead it without making profert? It is not necessary to consider that question, since in the present instance the deed is pleaded by way of inducement; and where that is the case, it has been holden that profert is unnecessary; Jevens v. Harridge (a); Com. Dig. tit. "Pleader" (O. 15); Banfill v. Leigh (b). There Lord Kenyon, in giving judgment, says, "It is not universally true that a profert must be made when a party pleading a deed derives title under it. It is not necessary where a conveyance to uses or a feoffment is pleaded; I only mention these two instances to shew that it is not an universal rule, others might be produced. But it never is necessary to make a profert of a deed which is pleaded only by way of inducement;" Meers v. French(c); Dagg **v.** Penkevon(d); Londre v. Mohun(e); Serle v. Bunnion(f); Waites v. Briggs (g); Stoddart v. Palmer (h). In the old books of precedents, several forms are given, and in none is it found that profert is made; Liber Placitandi, p. 42; Terry v. Page (i); Aston, p. 46.

Karslake, in support of the demurrer. Although possibly, in ordinary cases, the profert of the deed might be unnecessary; yet in the present it is indispensable, the plaintiff having chosen to make it the foundation of his title. Having relied, too, upon a particular title, he was bound to plead it correctly, and to shew that it was a valid one; Dorn v. Gashford (k); Mellor v. Spateman (l); Crowther v. Oldfield (m); Richards v. Fry (n). The declaration of the contract of th

ration would have been sufficient had it averred a possession

(a) 1 Wms. Saund. 8 b, 6th
ed.
(i) Lilly's Entr. 30.
(b) 8 T. R. 573.
(c) Styles, 193.
(d) Cro. Jac. 70.
(e) Freeman, 42.
(f) Id. 205.
(g) 2 Salk. 565.
(k) Comyn's Rep. 44.
(l) 1 Wms. Saund. 343, 6th
ed.
(m) 2 Ld. Raym. 1231; S. C.
Salk. 170, 364; 6 Mod. 19.
(n) 7 A. & E. 698; S. C. 3 N.

& P. 67.

(A) 3 B. & C. 2; S. C. 4 D.

THRISCUTT

O.

MARTIN
and Others.

1849. THRISCUTT v. Martin and Others. generally; but having professed to set forth a title, and stated it in a defective manner, it must be holden to be bad; Cudlip v. Rundle (a). But, further, there is no sufficient allegation of any possession; Tebbutt v. Selby (b). quite consistent with the averments of the plaintiff's right, that others might have an equal right with him. does the declaration disclose any sufficient allegation of the disturbance of the right, stated in the indenture, set out in the declaration.

Smirke in reply. The cases cited on the other side are not in point. Dorn v. Gashford (c), disclosed a title defective on the face of it. Richards v. Fry(d), was the case of a bad Escot v. Lanreny (e), and Jackson v. Mordant (f), shew clearly, that where the title is merely matter of inducement, it need not be fully set out. As to the objection, that the plaintiff's possession has not been alleged with certainty, it is possible that others might have had an equal right with himself; but if so, that should have been pleaded. The allegation of the disturbance of the plaintiff's right is correct. It is sufficient to state it in general terms.

PARKE, B.—I am of opinion that our judgment should be for the plaintiff. Several objections were taken to the validity of the declaration. The first was, that it begins with an allegation that Trevanion was possessed of one undivided moiety in certain waste land; and being so possessed, by a certain indenture, demised it to the plaintiff for twenty-one years: whereas it should have commenced with an averment of a seisin in fee. Mr. Smirke, however, contended that the title in this case was merely matter of inducement; and that where it is matter of inducement. it need not be set out. And we think that the cases cited

⁽a) Carth. 202.

⁽d) 7 A. & E. 698; S. C. 3 N.

⁽b) 6 A. & E. 786; S. C. 1 N.

[&]amp; P. 67. & P. 710.

⁽e) Owen, 109.

⁽c) Comyn's Rep. 44.

⁽f) Cro. Eliz. 112.

from Owen (a), and Cro. Eliz. (b), fully establish that proposition. If it had been necessary to commence with an averment of a seisin in fee, the declaration would be bad; for it would disclose a defective title, and would come within the principle laid down in Richards v. Fry. the defendants, who are primâ facie wrongdoers, cannot call upon the plaintiff to shew his title; and the title being pleaded by way of inducement, the authorities prove that it is not necessary, that it should be stated with the same certainty, that would have been required, had the action been founded on it. The second objection was that, although the plaintiff might have declared on his possession only; yet having chosen to declare on the demise from Trevanion, he has adopted the deed as the foundation of his title; and was, therefore, bound to make profert of We are all of opinion that it was matter of inducement only, and that profert was unnecessary. The third objection was, that there was no sufficient allegation of the disturbance of the plaintiff's right. But we also think that the defendants' interference is sufficiently stated, and that the declaration is in this respect quite good. In order to maintain the breach, it must be proved, that the effect of destroying the works and shafts erected by the plaintiff, was to prevent his exercise of the right of getting the clay which had been demised to him, and to which he was entitled. With respect to the last objection, that the license of the crown is not shewn to have been obtained, the consent of the co-owner is immaterial, and may be rejected.

Rolfe, B.—I am entirely of the same opinion. The foundation of the action was the disturbance of the plaintiff's possessory right; and it is admitted that, if he had declared simply on his possession, it would have been sufficient. Mr. Karslake, however, argued first, that in declaring on the deed, the plaintiff has imperfectly described

THRISCUTT

MARTIN
and Others.

⁽a) Escot v. Lanreny, Owen, (b) Jackson v. Mordant, Cro. 109. Elis. 112.

THRISCUTT v.
MARTIN and Others.

his title; and second, that he should have made profert of the indenture. With respect to the first objection, the cases referred to are decisive of the position, that it is immaterial to commence with an averment of a seisin in fee, where the title is pleaded as matter of inducement only. And as to the second objection, the same answer may be given, viz. that as the deed is mere matter of inducement, profert of it is unnecessary. It may be, that at the trial the plaintiff may be called on to establish his right; but as the deed is not the foundation of his title, that may be done by giving in evidence some written admission, without the production of the instrument itself.

PLATT, B., concurred.

Judgment for the Plaintiff.

Moore v. The Metropolitan Sewage Manure Company.

To an action of debt for work and labour, &c., brought against the Metropolitan Sewago Manure Company, the de-fendants pleaded, that as to 100/. parcel, &c., the plaintiff was and still is the holder of 100 shares in the company, and before and at the time. &c. was and still is, indebted

DEBT to recover the sum of 1000*l*. for work and labour, &c., in and about obtaining and procuring the passing of an act of Parliament to incorporate a company, called The Metropolitan Sewage Manure Company; for money paid; and on an account stated. Plea, as to 100*l* parcel, &c., that the plaintiff was and still is the holder of divers, to wit, one hundred shares in the said company, and before and at the time, &c., was and still is indebted to the defendants in a large sum of money, to wit, 100*l*, in respect of a call of a certain sum of money, to wit, 1*l*, upon each of the said shares, theretofore, and whilst the plaintiff was the holder of the said shares as aforesaid, to wit, on the 31st of August, 1847,

to the defendants in a large sum of money, to wit, 1001., in respect of a call of a certain sum of money, to wit, 11. upon each of the said shares, &c., duly made by the defendants, which said sum of money still remains unpaid and due, and equals the said sum, parcel, &c. Held, that the plea was bad on special demurrer, for not averring, pursuant to the 8 & 9 Vict. c. 16, s. 26, that thereby and by virtue of that and the special act, an action had accrued to the company.

duly made by the defendants; which said sum of money still remains unpaid and due, and equals the said sum, parcel, &c.

Moore

Metropo
ITAN SEWAGE

COMPANY.

Special demurrer, assigning the following causes among LITAN SEWAGE others, that the said plea does not shew whether the said calls became due by contract or by statutory enactments, or upon what contract or by what sort of liability, if any, the plaintiff is bound to pay the same; that it is not pleaded to the damages; that it ought to have set forth how the alleged money became due and by what contract, together with the time when the plaintiff contracted, and how and for what consideration, to pay the alleged calls, and when they were made, and by whom and when payable; and that it ought to have stated the particulars of the said call, so that the Court might judge whether it was lawfully made, and whether the plaintiff was bound to pay it; and that it ought to have stated that the plaintiff had notice thereof, and that the expression, that the plaintiff was indebted in respect of a call, is uncertain and ambiguous. Joinder in demurrer.

Willes, in support of the demurrer. There may be a question, whether the 8 & 9 Vict. c. 16, s. 26, is applicable to a plea of set-off. But even if it be, the plea in the present case is bad, for not following the form prescribed. By the 21st section, power is given to the directors to make calls. By the 26th section, it is provided, that "in any action or suit to be brought by the company against any shareholder to recover any money due for any call, it shall not be necessary to set forth the special matter, but it shall be sufficient for the company to declare that the defendant is the holder of one share or more in the company, (stating the number of shares), and is indebted to the company in the sum of money to which the calls in arrear shall amount, in respect of one call or more upon one share or more, (stating the number and amount of each of such calls), whereby an action hath accrued to the company by virtue of this and

D. & L.

VOI. VI.

MOORE

METROPOLITAN SEWAGE
MANURE
COMPANY.

the special act." The plea, therefore, ought to have averred that the action had accrued by virtue of the act and the special act. [He was then stopped.]

Peacock, contrà, prayed leave to amend.

PARKE, B.—The plaintiff contends, that if the defendants in their set-off rely on the act, they should bring themselves within its terms. The defendants may amend, by stating in the plea that thereby an action hath accrued to the company, by virtue of this, and the special act. The amendment to be made in a week, otherwise there will be judgment for the plaintiff.

Pollock, C. B., Alderson, B., and Platt, B., concurred.

Leave to amend in a week, otherwise judgment for the Plaintiff.

COURT OF QUEEN'S BENCH.

Bilarp Cerm.

IN THE TWELFTH YEAR OF THE REIGN OF VICTORIA.

REGINA P. BISHOP.

A RULE had been obtained in Trinity Term, 1848, where an incalling upon the prosecutor to shew cause why the side-bar rule made in this cause, on the 12th day of May, 1848, referring it to the coroner and attorney of this Court, to this Court by tax the costs to be paid by the defendant to the prosecutor, or to his attorney, should not be set aside.

The affidavit upon which the present rule was obtained, is convicted, the party employing the ability of indictment for embezzlement was preferred and conduct the found against the above named defendant, at the General Quarter Sessions of the peace in and for the county of charge the prosecution, and at whose charge the prosecution, is October, 1847: that the indictment was removed by writ of certification this honorable Court at the instance of indictment indictment.

1849.

dictment is removed from sessions into this Court by certiorari, at the defendant's instance, and the defendant the party employing the attorney to conduct the prosecution. and at whose charge the proceedings are carried on, is, within the meaning of

the 5 & 6 Wm. and M. c. 11, s. 3; and, if also a "party grieved" by the offence, is entitled to costs: although another party may have entered into the recognizances, and been bound over to prosecute the charge.

over to prosecute the charge.

Whether the party claiming costs under the above section is, in point of fact, the "prosecutor" or not, is a matter which the Court will inquire into upon affidavit.

REGINA b.
BISHOP.

the defendant, on or about the 19th of October in the same year, and that the proper recognizances were entered into to prosecute the said writ of certiorari: that the said defendant was, on the 29th day of February, 1848, tried upon the indictment at the Lent Assizes in and for the said county of Southampton, and found guilty thereon, and is now undergoing the sentence of the law pronounced upon him: that on the 12th of May, in the same year, an order of this Court was obtained, referring it to the coroner and attorney of this Court to tax the costs to be paid by the defendant to the prosecutor, or to his attorney: that on the 10th of June, the deponent was served by the attorney for the prosecution with an appointment for Tuesday, the 13th of June, to tax the costs to be paid by the defendant to the prosecutor or to his attorney: that the taxation was not entered upon, but stood over for a further appointment: that the indictment was preferred at the instance of, and prosecuted by, Henry Stokes, of Christchurch, in the said county of Southampton, accountant, as appears by the recognizance entered into by him, and returned to this honorable Court, as part of the return to the said writ of certiorari: that the said Henry Stokes is not a party aggrieved or injured, or a justice of the peace, mayor, bailiff, constable, headborough, tythingman, churchwarden, overseer of the poor, or other civil officer prosecuting such indictment, on account of any fact committed or done that concerned him as such officer to prosecute or present, within the meaning of the statutes in that case made and provided: that he is informed and verily believes, that the said Henry Stokes is not a shareholder in the Wilts and Dorset Banking Company at Christchurch aforesaid; the shareholders of which company were the parties aggrieved by the offence, the subject of the before mentioned prosecution: that the said H. Stokes was appointed clerk or servant of the said Wilts and Dorset Banking Company, on or about the 22nd of September, 1847, the time of the committal of the said defendant to prison at Winchester aforesaid, on the before mentioned charge of embezzlement: that the deponent has been informed and verily believes, that the deed of settlement of the said Wilts and Dorset Banking Company forbids their servants to be shareholders of such company, with the exception of the general manager: that the said Wilts and Dorset Banking Company are, as the deponent has been informed and verily believes, a registered company under the 7 Geo. 4, c. 46; and that the two registered public officers of such company are Samuel Provis and John Cusse; the first as registered general manager, and the other as registered general director.

In answer to the rule, there was an affidavit by Stokes, that at the request of James Druitt, of, &c., the attorney for the prosecution, he, on the 22nd day of September, 1847, became bound in recognizance before, &c., one of, &c., for the prosecution of the above named defendant, Edward Owen Bishop, for the offence charged in the indictment in this prosecution: that except as therein appeared, he had been in nowise concerned in the prosecution, or in preferring the indictment, and had given no instructions whatsoever to the attorney for the prosecutor or any other person respecting the same; and that he had not incurred or rendered himself liable to any cost or expense whatsoever relating thereto. There was also an affidavit by Samuel Provis, the registered general manager of the company, that the shareholders of the Wilts and Dorset Joint Stock Banking Company are the parties aggrieved by the offence, the subject of this prosecution, and that the company was a registered company under the 7 Geo. 4, c. 46: that he is, and was at the time of the committing of the offence by the defendant, and of the said prosecution, the general manager, and one of the public registered officers of the said company, and also a shareholder thereof, and one of the parties aggrieved by the said offence: that he was and is the real proseREGINA v. Bishop.

REGINA

BISHOP.

cutor in this prosecution, and that he gave instructions to James Druitt, of, &c., for the prosecution of the above named defendant for the said offence, and that he is liable to pay the said James Druitt the costs of the prosecution, and has actually paid part of the same: that he was not present at Christchurch aforesaid when the defendant was committed to take his trial for the offence, but was at his usual residence at Salisbury aforesaid, distant twentyseven miles from Christchurch, and that he therefore did not enter into any recognizance to prosecute the defendant for the said offence. There was also an affidavit by Druitt, which stated that he was the attorney for the prosecutor, and that as such attorney he received his instructions for the conduct of this prosecution from Samuel Provis, of the city of Salisbury, manager and public registered officer, and a shareholder of the Wilts and Dorset Joint Stock Banking Company, and one of the parties aggrieved by the offence, the subject of this prosecution; such prosecution being against the defendant for embezzling the property and monies of the said company whilst he was in the employment of the said company: that the offence was committed at Christchurch aforesaid, and that the defendant was there examined by the Hon. E. A. J. H., one of her Majesty's justices of the peace for the said county of Southampton, and thence on the 22nd day of September, 1847, committed by the said justice to the gaol at Winchester, in the said county, to be there tried for the said offence: that Salisbury aforesaid, the residence of the said Samuel Provis, is distant twenty-seven miles from Christchurch aforesaid, and that the said Samuel Provis was not personally present at the said examination; and that on the committal of the defendant, it being necessary that some person should be bound by recognizance to prosecute the defendant, for the offence for which he was so committed, and neither the said Samuel Provis nor any other public registered officer of the said company being then and there present, the deponent suggested to the said justice that one

Henry Stokes, then and still the manager of the branch bank of the said company at Christchurch aforesaid, should be so bound; but this deponent saith that the said Henry Stokes except as aforesaid, did not in any way intermeddle with the said prosecution, or act, or give directions therein, as the prosecutor thereof: that the said Henry Stokes hath been at no expense as a prosecutor therein, and has not paid, and is not in any way liable to pay this deponent, or as this deponent believes, to any other person or persons, any costs or expenses therein incurred: and that the said Samuel Provis being such general manager and public registered officer, and so employing this deponent to prosecute as aforesaid, is liable to pay to this deponent this deponent's bill of costs, as the attorney for the said prosecution, and has actually paid a part thereof.

REGINA
v.
BISHOP.

Barstow and C. Saunders now shewed cause. The question in this case will be, whether the party claiming costs is really "the prosecutor" and the "party grieved" by the offence for which the defendant was convicted, within the meaning of the 5 & 6 Wm. and M. c. 11, s. 3 (a). That the party claiming the costs is "the party grieved" by the offence and "the prosecutor" of the in-

(a) 5 & 6 Wm. and M. c. 11, s. 3. "If the defendant prosecuting such writ of certiorari, be convicted of the offence for which he was indicted, then the said Court of King's Bench shall give reasonable costs to the prosecutor, if he be the party grieved or injured, or be a justice of the peace, mayor, bailiff, constable, headborough, tithing-man, churchwarden, or overseer of the poor, or any other civil officer, who shall prosecute upon the account of any fact committed or done

that concerned him or them as officer or officers to prosecute or present, which costs shall be taxed according to the course of the said Court; and that the prosecutor for the recovery of such costs shall, within ten days after demand made of the defendant, and refusal of payment, on oath, have an attachment granted against the defendant by the said Court for such his contempt; and that the said recognizance shall not be discharged, till the costs so taxed shall be paid."

REGINA
v.
BISHOP.

dictment, must, it may be admitted, be proved to the satisfaction of the Court; and the Court will inquire into the facts upon the question of costs arising; Rex v. Joseph Smith (a); Rex v. The Inhabitants of Taunton St. Mary (b); Rex v. Commerell and Ellis (c); Rex v. Cook (d); Reg. v. Earl of Waldegrave (e); Reg. v. Williams (f); Reg. v. Dobson (a). As to being "the party grieved," Mr. Provis is not only the registered public officer of the company, but also a shareholder; and, therefore, clearly a party grieved by the embezzlement of the monies of the company, which was the subject of the indictment. does not even require a pecuniary interest in the subjectmatter of the offence to constitute the party, "a party grieved." In Rex v. The Inhabitants of Taunton St. Mary, which was an indictment for not repairing a highway, several persons were held entitled to costs, as being parties grieved; they having used the way for many years in passing and repassing from their homes to the next market town, and being obliged, by reason of the want of repair, to take a more circuitous route. In Reg. v. Dobson, it was held, that where an indictment was prosecuted by persons having some interest in the subject-matter, and removed by certiorari; the prosecutors, on conviction, are entitled to costs as parties grieved, though the expenses of prosecution have been paid by other persons. Nor is it required that the party should be named as prosecutor on the back of the indictment; Rex v. Joseph Smith; Rex v. Commercell and Ellis. Nor does it signify that the order is for the payment of costs "to the prosecutor" or his attorney; if the party claiming shew that he is in fact the prosecutor; Rex v. Commercil and Ellis. The real "prosecutor" is the party, at whose instance, and at whose expense, the prosecution is conducted.

⁽a) 1 Burr. 54.

⁽e) 2 Q. B. 341; S. C. 1 G.

⁽b) 3 M. & S. 465.

[&]amp; D. 615.

⁽c) 4 M. & S. 203.

⁽f) 6 Q. B. 273.

⁽d) 1 M. & R. 526.

⁽g) 9 Q. B. 302.

Cockburn and Poulden, in support of the rule. conceded by the other side, that unless Mr. Provis is the "prosecutor" of this indictment, he is not entitled to costs, under the stat. 5 & 6 Wm. and M. c. 11, s. 3; and it is submitted that he is not the "prosecutor" within the meaning of that section. By section 2 of that statute, the recognizance to be taken before allowing a certiorari to a defendant to remove an indictment, must be certified into the Queen's Bench, with the certiorari and indictment, to be there filed; and the name of the prosecutor, if he be the party grieved or injured, or some public officer, to be indorsed on the back of the said indictment. Stokes was the party bound over to prosecute, and entered into a recognizance as prosecutor; and Mr. Provis seems to have nothing to do with the case, either as witness or prosecutor. It is true, he says, he has paid part of the expenses of the prosecution, and is liable to pay the rest; but those facts alone would not entitle him to the benefit of this statute. No case can be cited where the real prosecutor has been allowed to come forward and oust the nominal prosecutor. If a party stands by and lets another be bound over to prosecute, he cannot afterwards come and say that he is What name could be indorsed on the the real prosecutor. back of the indictment, in compliance with the second section of the statute, but that of Stokes. "prosecutor" is one well known to the law. to the construction contended for by the other side, it is only necessary to shew that a party has paid the costs of the prosecution, and is a party grieved, to entitle him to the costs; without shewing that he is "prosecutor" at all. The object of the statute, however, was to protect persons required by law to prosecute, and does not apply to a person like Mr. Provis, who was not in any way bound to prosecute. [They referred to Rex v. Ingleton (a); Rex v.

REGINA P. BISHOP.

REGINA

BISHOP.

Edwards (a); Rex v. Dewhurst (b); Rex v. Incledon (c); Reg. v. Earl of Waldegrave (d).

ERLE, J.—It appears to me that Mr. Provis was the "prosecutor" of this indictment within the meaning of the act of Parliament. Whether or not he was "the prosecutor," is a proper matter for the Court to inquire into upon affidavits; and the affidavits in this case satisfy me upon this point.

The proceedings were put in motion by Mr. Provis. It was at his suggestion, and at his costs, that the attorney superintended the preferring the indictment. If an action had been brought against Mr. Provis for a malicious prosecution, it seems to me there would have been little difficulty in satisfying a jury, upon these facts, that the prosecution was in point of fact instituted by him.

The argument, in support of the rule, has been rested on the ground that the "prosecutor" is a party well known to the law, as being the person who enters into a recognizance to appear and prosecute the charge against the defendant; and that because Stokes was the party so bound over to appear and prosecute, he was therefore the "prosecutor" of this indictment. It might certainly be strong evidence of the fact, if unexplained; but being explained, it presents no difficulty. The attorney who conducted the prosecution, might be called to say, on whose behalf he conducted the prosecution; and it appears that, in reality, Stokes was a mere agent in the matter, authorized by the attorney of Mr. Provis. I, therefore, think that the party now claiming the costs is, in point of fact, "the prosecutor" in this case.

Then does he fulfil the other condition, namely, that he should be the "party grieved." It appears that he is the

⁽a) 5 B. & Ad. 407, (note).

⁽c) 1 M. & S. 268.

⁽b) 5 B. & Ad. 405; S. C. 2 N. & M. 253.

⁽d) 2 Q. B. 341.

general manager of the company, and is therefore paid out of its funds; but, besides that, he is a shareholder. He is, therefore, clearly a "party grieved" by the diminution of those funds. The rule must, consequently, be discharged, and with costs.

1849. REGINA Вівнор.

Rule discharged, with costs.

REGINA v. JUSTICES OF BERKSHIRE.

THE following order, made under the 3 & 4 Vict. c. 54, An order upon was removed into this Court by certiorari, for the purpose the guardians of an union for of being quashed:-

To the Guardians of the Newbury Union.

Whereas at the General Quarter Sessions of the peace holden in and for the county of not direct the Berks, at Abingdon in the said county, on Monday, the "on behalf of 4th day of January, 1847, upon the trial of one John Smith, being then and there indicted for a certain felony by him alleged to have been committed, it was given in evidence that the said J. S. was insane at the time of the commission of such offence, and the said J. S. was thereupon acquitted of the said felony by the jurors sworn to try the same; and it was specially found by the jurors aforesaid on the said trial, that the said J. S. was insane at the time of the commission of the said felony. And the said jurors thereupon declared that they acquitted the said J. S. of the said felony on account of such insanity, whereupon it was ordered by the Court, in pursuance of the statute, &c., that the said thereto. J. S. should be kept in strict custody in her Majesty's gaol at Reading, in and for the said county, until her Majesty's pleasure should be known touching the custody of the said J. S. And whereas the said J. S. now is a criminal lunatic

the payment of the maintenance of a criminal lunatic, under the 3 & 4 Vict. c. 54, s. 2, did the parish" pauper was chargeable : Held no ground for quashing the order, as it recited all the facts establishing the liability of the parish; so that a payment in obedience to such order would be a payment on behalf of the parish, and chargeable

REGINA
v.
Justices of Berkshire

kept in custody in her Majesty's said gaol at Reading, in and for the said county, under and by virtue of the above recited order of the said Court of Quarter Sessions. whereas we, Richard Fellowes and George Beauchamp, Esquires, whose hands and scals are hereunto affixed, two of her Majesty's justices of the peace in and for the said county, have this day inquired into the circumstances and place of the last legal settlement of the said J. S., by the best legal evidence that could be procured under the circumstances of the present legal disability of the said J. S., and particularly by the oath of one Sophia Smith, of the parish of Newbury, in the said county, widow, the mother of the said J. S. And whereas it appears to us, as well upon the oath of the said Sophia Smith as otherwise, that the said J. S. is not possessed of sufficient property which could be applied to his maintenance, and that the place of his last legal settlement is the parish of Newbury aforesaid, in the said county of Berks.

Now we, the said justices, upon due consideration of all and singular the premises, do hereby adjudge the parish of Newbury to be the place of the last legal settlement of the said J. S.

And whereas the Right Honorable Sir George Grey, Bart., her Majesty's principal Secretary of State for the Home Department, has, by writing under his hand and seal, bearing date the 14th day of September, 1848, directed in manner and form following, that is to say, "Whereas by an act passed," &c., (the 3 & 4 Vict. c. 54), "it is enacted," &c., (section 1 was here recited). "And whereas it has been certified to me, under the hands of Richard Fellowes and George Beauchamp, Esquires, two justices of the peace, and under the hands of John Bulley and F. A. Bulley, surgeons, being persons authorized as aforesaid, that J. S., who was at a quarter sessions of the peace holden at Abingdon, in the county of Berkshire, in January, 1947, indicted for sheep stealing, and acquitted on the ground of

insanity, and who is now confined in Reading gaol, in the said county, has become insane. And whereas the Lunatic Asylum at Devises, in the county of Wilts, has been recommended to me as a fit and proper receptacle for the said And whereas it has been certified to me by two justices of the peace, that they intend to make an order upon the Newbury union in the county of Berks, in which the said lunatic has been adjudged to be settled for the weekly maintenance of the said lunatic in a lunatic asylum, I do hereby, in pursuance of the act of Parliament above recited, authorize and direct you to cause the said J. S. to be removed from the said gaol to the said lunatic asylum, there to remain (maintenance for the said lunatic to be provided as aforesaid) until further order shall be made And for so doing, this shall be your warrant. Given at Whitehall, the 14th day of September, 1848, in the twelfth year of her Majesty's reign.

G. GREY, L. s."

"To the keeper of the gaol at Reading, in the county of Berks, and all others whom it may concern."

Now we, the said justices, upon proof before us of all and singular the premises, do hereby further order and direct you, the guardians of the Newbury union, being an union declared by the poor law commissioners, within which the parish of Newbury aforesaid is comprised, to pay weekly and every week, from and after the 26th day of September next, to Thomas Phillips, the proprietor of the said lunatic asylum, the sum of ten shillings, which we do hereby adjudge to be a reasonable charge for the maintenance of the said J. S. in the said lunatic asylum, and which the said Thomas Phillips, the proprietor thereof, is willing to receive in that behalf, for and during so long a time as the said J. S. shall continue in custody in the said lunatic asylum, by virtue of the said order of the secretary of state as aforesaid; the first payment of the said weekly

REGINA
v.
Justices of BERKSHIRE.

REGINA

7.

Justices of Berkshire.

sum of ten shillings to commence on the 3rd day of October, 1848. Given under our hands and seals, the 23rd day of September, in the year of our Lord, 1848.

RICHARD FELLOWES, L. S. GEORGE BRAUCHAMP, L. S.

Fitzherbert now moved for a rule nisi to quash the above order. The order ought to be made under the 2nd section of the 3 & 4 Vict. c. 54 (a), and not under the 7th section,

(a) 3 & 4 Vict. c. 54, 8. 1. "That if any person, while imprisoned in any prison or other place of confinement," &c., "shall appear to be insane, it shall be lawful for any two justices of the peace of the county, city, borough, or place where such person is imprisoned, to inquire, with the aid of two physicians or surgeons, as to the insanity of such person; and if it shall be duly certified by such justices, and such physicians or surgeons, that such person is insane, it shall be lawful for one of her Majesty's principal secretaries of state, upon receipt of such certificate. to direct, by warrant under his hand, that such person shall be removed to such county lunatic asylum, or other proper receptacle for insane persons, as the said secretary of state may judge proper and appoint," &c.

Sect. 2. "That in all such cases as aforesaid, unless one of her Majesty's principal secretaries of state shall otherwise direct, it shall be lawful for such two justices, or any other two justices of the peace of the county," &c., "where such person is impri-

soned, to inquire into and ascertain, by the best evidence or information that can be obtained under the circumstances, of the personal legal disability of such insane person, the place of the last legal settlement, and the pecuniary circumstances of such person; and if it shall not appear that he or she is possessed of sufficient property which can be applied to his or her maintenance, it shall be lawful for such two justices, by order under their hands, to direct the overseers of the parish where they adjudge him or her to be lawfully settled, or in case such parish be comprised in a union declared by the poor law commissioners, or shall be under the management of a board of guardians established by the poor law commissioners, then the guardians of such union. or of such parish (as the case may be) to pay on behalf of such parish, in the case of any person removed under this act, all reasonable charges for inquiring into such person's insanity, and for conveying him or her to such county lunatic asylum or receptacle for insane persons, and to which applies only to criminal lunatics in gaol; and it should state that the payment by the guardians of the union is to be "on behalf of the parish of Newbury;" otherwise the guardians, who are mere trustees for the purpose of payment, are not authorized to charge it to the parish, but must pay it out of the funds of the union. If

REGINA

Justices of BERKSHIRE.

pay such weekly sum as they or any two justices shall, by writing under their hands, from time to time direct, for his or her maintenance in such asylum or receptacle in which he or she shall be confined." &c.

Sect. 5. "That the overseers of the parish in which the justices shall adjudge any insane person to be settled, or in case such parish be comprised in a union, or be under the management of a board of guardians. then either the guardians of such union or parish (as the case may be), or the overseers of such parish. may appeal against such order to the general quarter sessions of the peace to be holden for the county," &c., "where such order shall be made, in like manner and under like restrictions and regulations as against any order for removal," &c.

Sect 7. "'And whereas by the said last mentioned act'" (9 Geo. 4, c. 40) "'it was, among other things, enacted, that it should be lawful for two justices of the peace of the county where any person should be kept in custody as an insane person by order of any Court, or by his Majesty's order subsequent thereunto, to inquire into and ascertain the settlement and circumstances of such insane person, and to

make order for the payment of such weekly sum for his or her maintenance, as one of his Majesty's principal secretaries of state should, by writing under his hand, from time to time direct: and whereas it is expedient that so much of the said act as relates to such direction to be given by such secretary of state should be repealed, and other provisions made in the place thereof:' be it therefore enacted, that so much of the said act as relates to such directions to be given by such secretary of state, shall be and the same is hereby repealed; and that it shall be lawful for such two justices, by order under their hands, to direct the overseers of the parish in which they shall adjudge such insane person as last aforesaid to be legally settled, or in case such parish shall be comprised in a union declared by the poor law commissioners, or shall be under the management of a board of guardians established by the poor law commissioners, then the guardians of such union or parish, as the case may be, to pay such weekly sum for the maintenance of such person as they or any such two justices shall, by writing under their hands, direct."

REGINA
v.

Justices of
BERKSHIRE.

it be taken to be made under the 7th section, this consequence would follow, that no appeal would lie; for the appeal clause, section 5, seems to apply only to orders made under the 2nd section.

Cur. adv. vult.

ERLE, J.—A rule nisi for quashing an order on the guardians of the Newbury union to pay the maintenance of a criminal lunatic in an asylum, was moved for on the ground that such order did not direct the payment to be "on behalf of the parish."

But inasmuch as the order recites all the facts establishing the liability of the parish, so that a payment in obedience to such order will be a payment on behalf of the parish, and chargeable thereto; and, as a new order containing the required addition would only have the effect of expressing more clearly this liability, I see no sufficient reason for quashing the present order. The rule is, therefore, refused.

Rule refused.

REGINA v. JUSTICES OF PETERBOROUGH.

A parish, upon whom an order of removal was served, appealed against the order. On the appeal coming on to be heard, the appellants were called upon to prove the order of

A RULE had been obtained in Michaelmas Term last, calling upon the justices of Peterborough to shew cause why a writ of mandamus should not issue directed to them, commanding them to enter continuances and hear an appeal against an order of removal of certain paupers from the parish of Peterborough, in the county of Northampton, to the parish of Gretton, in the same county.

removal, which, according to the practice of the sessions, they were bound to do, but which they could not do, as the original order had not been served, but only a copy, and they had given no notice to produce the original, so as to admit secondary evidence of it. The sessions accordingly dismissed the appeal. On the following day, the paupers were removed; upon which the appellants again appealed, and on the appeal coming on to be tried, and being found to be against the same order as the former appeal, the sessions dismissed it on that ground. Held, on motion for a mandamus to compel the sessions to hear the appeal, that the sessions, acting upon a reasonable practice in their Court, were entitled to dispose of the first appeal, after the hearing was entered upon; and having done so, that there was no further right of appeal on the removal of the pauper.

It appeared upon the affidavits, that an order for the removal of certain paupers from the parish of Peterborough to the parish of Gretton, in the county of Northampton, had been made on the 25th of March, 1848; against which the overseers of the parish of Gretton lodged an appeal at the sessions held at Peterborough, on the 29th of June, in the same year. On the appeal being called on, the respondents required the appellants to prove the order of removal. It appeared that the latter had been served with a copy only of the order, and had given no notice to produce the original order, which had not been filed in Court. The practice of the sessions required that the appellants should prove the order of removal against which they appealed, if called upon to do so by the respondents; and as they could not do this, the justices dismissed the appeal. On the following day, the paupers were removed under the same order; and on the 20th of August, the appellants treating the actual removal as a fresh grievance, gave fresh notice and grounds of appeal. The appeal came on for trial at the quarter sessions, on the 19th of October, when the respondents objected that the appellants having already once appealed against the order, and their appeal having been dismissed, they could The sessions were of that not have a second appeal. opinion, and refused to hear the appeal. Upon which the present rule had been obtained; against which

REGINA

v.

Justices of PETERBOROUGH.

Butt and Worlledge now shewed cause. The sessions, it is submitted, acted rightly in dismissing the appeal on both occasions. Numerous cases have decided that the quarter sessions are the proper judges of their own rules of practice, and that where the sessions have acted in conformity to them, this Court will not interfere to review their decision, unless the rule is so manifestly unreasonable, as to be illegal; Rex v. Justices of Suffolk (a); Reg. v. Justices of

(a) 6 M. & S. 57.

REGINA
v.
Justices of PETERBOROUGH.

Montgomeryshire (a), and Reg. v. Justices of Warwickshire (b). In Reg. v. Justices of Sussex (c), the very same point arose as in the present case. There the appellants were called upon to prove the order of removal, which they could not do, as the original order was not in Court, and they had given no notice to the respondents to produce it, so as to let in secondary evidence. Their appeal was consequently dismissed. Mr. Justice Patteson, before whom the case was argued, on a motion for a mandamus, after time taken to consider his judgment, there held that this Court would not interfere. That case is expressly in point, and the Court cannot grant the present application without overruling it. But in the present case it will be said, that the appellants were entitled to a fresh appeal when the actual removal of the paupers took place. That, however, it is submitted, is not so. No doubt, it is well settled that the parties upon whom the order of removal is served, may treat the service of the order itself as the grievance, and appeal against it; or wait till the actual removal takes place, and then appeal; Reg. v. Recorder of Leeds (d). But they cannot appeal first against the order, and when that appeal is dismissed, appeal a second time on the removal. In Reg. v. The Inhabitants of Oundle (e), where an appeal against an order of removal was dismissed, subject to a case, on the ground that no statement of grounds of appeal had been given to the respondents, and a second appeal was entered and respited at the same sessions; and afterwards, on its coming on to be tried, the sessions, on finding that the order appealed against was the same as in the first appeal, dismissed the appeal without further hearing, this Court refused to interfere with their decision. In Reg. v. Justices of Middlesex (f), the appellants gave notice of appeal, within

⁽a) Ante, vol. 3, p. 119.

⁽e) 3 Q. B. 353; S. C. 2 G.

⁽b) 6 Q. B. 750.

[&]amp; D. 77.

⁽c) 9 Dowl. 125.

⁽f) 9 Dowl. 163, 170.

⁽d) 8 Q. B. 623.

1849.

twenty-one days after service of the order, but did not prosecute the appeal; and a considerable time afterwards, when an actual removal took place, gave a fresh notice of appeal; and the Court there granted a mandamus to compel the justices to hear the appeal, as no appeal had been previously heard on the matter. Mr. Justice Patteson, in that case, in giving judgment, said, "I have no doubt, that if the appellant parish had lodged and prosecuted an appeal, in pursuance of their notice, and had failed, whether on a point of form or on the merits, and the pauper had afterwards been removed, as the 79th section directs, the appellant parish could not have appealed again." In Rex v. The Justices of the West Riding (a), a power of appeal was given by 17 Geo. 3, c. 106, on certain conditions; and it was held, that if the quarter sessions dismissed the appeal without entering into the merits, because the conditions had not been complied with, and confirmed the conviction, such judgment was conclusive, and the party could not lodge a second appeal against the same conviction, though within the time limited by the statute. [They referred also to Reg. ∇ . Inhabitants of Stayley (b).

REGINA

5.

Justices of
PeterBorough.

Pashley, in support of the rule. In Rex v. The Justices of the West Riding, the appellant had not complied with a condition precedent to appeal, required by the act of Parliament. Here proof of the order of removal is not a condition precedent. It seems scarcely right that a preliminary objection, of a purely technical kind like the present, should be held to be binding upon the parties, the same as if the case had been decided upon the merits. [Erle, J.—Reg. v. Justices of Sussex (c) is a specific adjudication upon this point; and, sitting alone, I cannot be asked to review that decision.] Then, it is submitted, that the sessions

⁽a) 3 T. R. 776. & D. 676.

⁽b) 3 Q. B. 357; S. C. 2 G. (c) 9 Dowl. 125.

REGINA
v.
Justices of
PETERBOROUGH

were wrong in refusing to hear the second appeal. It is conceded, that the parish against whom an order of removal is procured, may appeal either against the order, or wait till the actual removal, and then appeal. The first appeal against the order not having been heard upon the merits, must be taken as an abortive appeal; and the appellants were in the same state as if they had not appealed at all against the order; and were, therefore, at liberty to appeal when the actual removal took place. The decision in Reg. v. Justices of Middlesex (a), is in favour of the view now contended for. There a notice of appeal, upon service of the order, was given: but nothing done upon it; and on an actual removal, a second notice of appeal was given; and the justices having refused to hear the second appeal, this Court compelled them to do so. The opinion, attributed to Mr. Justice Patteson, that if the appellants had lodged and prosecuted their first appeal, and failed, "on a point of form," "the appellant parish could not have appealed again," is no doubt entitled to great weight; but was not necessary for the decision in Reg. v. Justices of Sussex (b). In Reg. v. Justices of West Riding (c), the parish on whom the order of removal was served had appealed against the order, and afterwards abandoned the appeal; and they were held to be entitled to appeal again when the paupers were actually removed. The stat. 13 & 14 Car. 2, c. 12, s. 2, says, that persons aggrieved "may appeal" to the quarter sessions; not that they shall have "an appeal." [Erle, J.— Yes, but does that mean that they "may appeal" twice? They may endeavour to appeal twice. [Erle, J.—Yes, and if there had only been an endeavour to appeal in the first instance in this case, I should have decided in your favour; but I cannot think that after the appeal being entered and called on for trial, and the case commenced.

⁽a) 9 Dowl. 163, 170.

⁽c) 5 Q. B. 1; S. C. 3 G. & D.

⁽b) Id. p. 125.

it can be said that the party has had no appeal. referred also to Rex v. Justices of Staffordshire (a).]

1849. REGINA

Cur. adv. vult.

Justices of PETER-ROROUGH.

ERLE, J., afterwards delivered judgment.—The decision in this case depends upon whether the justices acted, on the first appeal, according to a reasonable practice in their Court, in requiring the appellants to prove the original I am of opinion they did so act, and that the quarter sessions were entitled to dispose of the appeal, after the hearing was entered upon; and that the first appeal was therefore disposed of according to law. The appeal then having been once disposed of, when that decision was given; I am of opinion that no new right of appeal arose on the actual removal of the paupers. The rule must, therefore, be discharged.

Rule discharged.

(a) 4 A. & E. 842; S. C. 6 N. & M. 477.

FREEMAN v. ROSHER.

CARRINGTON moved for a rule calling on the de- The rule that fendant to shew cause why the Master should not review a party to entitle himself his taxation in the above cause.

to have the costs of wit on taxation.

It appeared that this was an action of debt to recover a nesses allowed

must have previously actually paid them, applies as well to the case of a plaintiff who sues in forma pauperis, as to that of any other plaintiff.

An order was made in the usual form under Reg. Gen., Hilary Term, 4 Wm. 4, Pt. I. r. 20, that the costs of proving certain documents not admitted by the defendant, and which should be proved at the trial to the satisfaction of the Judge or other presiding officer, certified by his indorsement thereon," should be paid by the defendant, in any event. At the trial, in consequence of the admission of the defendant's counsel, the documents were not proved, and no certificate was given. Held, on motion to review the taxation, that the Master acted rightly in refusing to allow the costs of witnesses to prove the documents.

Held also, that the plaintiff having failed in the action, was not entitled to the costs of a

witness whose evidence was applicable to an issue on which he succeeded, but who was also called to support one on which he failed.

FREEMAN D. ROSHER.

sum of 181. 19s. 7d. for work, labour, and materials, &c.; and that the plaintiff had been admitted to sue in forma pauperis. The defendant had pleaded, except as to 10s., never indebted, a set off, and payment; and as to that sum, payment into Court. Issue having been joined, the plaintiff, before proceeding to trial, took out a summons, calling on the defendant to admit certain documents; and the defendant refusing to admit them, the learned Judge before whom the summons was heard, made an order in the usual form, under Reg. Gen., Hilary Term, 4 Wm. 4, r. 20, that the costs of proving the documents specified in the plaintiff's notice, which should "be proved at the trial to the satisfaction of the Judge or other presiding officer, certified by his indorsement thereon, should be paid by the defendant, whatever might be the result of the cause." At the trial, the plaintiff had a verdict on the first issue, and the defendant on the other issues. The documents were not proved at the trial, in consequence of the admission of the defendant's counsel. The Judge did not give any certificate. On taxation of the costs, the Master disallowed the costs of two witnesses called by the plaintiff to support the first issue, because they had not been actually paid their expenses by the plaintiff. disallowed the costs of witnesses called to prove the documents; and also a witness who was called as well to support the first issue, as to disprove the defendant's plea of set-off. It appeared upon the affidavits, that the plaintiff had paid one witness his costs since the taxation.

Carrington. The rule that all witnesses must be actually paid before the costs of their attendance can be allowed on the taxation of costs, cannot apply to the costs of witnesses in favour of a pauper plaintiff. If it is a condition precedent to a witness's costs being allowed on taxation, that he must be actually paid by a man not worth 51, it is quite clear, that in many cases the costs could never be allowed at all. The plaintiff states that he paid as long as he could;

and, as a proof of bona fides, he states that he has actually paid one witness since the taxation. With respect to the other witnesses, it was not certified by the Judge before whom the cause was tried, that they had proved the documents, because the admission of the defendant's counsel rendered the proof unnecessary. The plaintiff was, at any rate, entitled to the expenses of the witness called to prove the first issue on which he succeeded; although his evidence might also be applicable to other issues on which he did not succeed.

Cur. adv. vult.

ERLE, J., delivered judgment.—A review of taxation was moved for on the ground that the claim for expenses of two witnesses was disallowed, by reason of the not having been paid to them before taxation; and it was contended that the rule requiring such previous payment, ought to be relaxed in favour of pauper plaintiffs, who are unable to make the advance.

But it appears to me that this ground is insufficient. The law requires such previous payment to prevent the witnesses being defrauded by the attorney. In the taxation of costs in a pauper cause, the attorney alone is immediately interested; and as the privileges intended for the benefit of the poor have, according to experience, been used by some attorneys as instruments of extortion, the precautions against fraud should not be relaxed in favour of the attorneys for paupers.

A second ground for a review was, that the expenses of witnesses to prove documents had been disallowed, where a Judge's order for the costs of proof of such documents had been made, and the proof was not given at the trial, in consequence of the admissions made by the defendant's counsel rendering it unnecessary. But such costs are due only in case of the Judge at the trial certifying that the proof was to his satisfaction, and, as there was no certificate, they were properly disallowed.

FREEMAN 5.
ROSHER.

1849. FREEWAN ROSHER.

A third ground was, that one of the witnesses to these documents was also a witness upon the issue found for the plaintiff; but inasmuch as the plaintiff failed in the action, and succeeded only on one issue, he has no right to the costs of a witness applicable both to the issue on which he succeeded, and to an issue on which he failed.

Rule refused.

In re an Arbitration. WILLIAM SMITH and Another, plaintiffs, Between HENRY REECE, defendant. HENRY REECE, plaintiff, And between WILLIAM SMITH and Another, defendants.

A general verdict was taken for the plaintiff on all the issues in an action, subject to a reference of that and another cross action between the same parties, in which issue had not been joined, with

A RULE had been obtained in Michaelmas Term last, calling upon the plaintiffs in the first mentioned cause, and the defendants in the last mentioned cause, to shew cause why the two awards or certificates made between the parties, and the judgments signed in pursuance thereof, should not be set aside, upon several grounds (a).

(a) The grounds are sufficiently stated in the arguments and judgment.

power to the arbitrator to make "an award or certificate." The arbitrator delivered two papers, containing two certificates for the two causes: Held, on motion to set aside the certificates, that it might be intended that the papers were made at the same time; and, if so, they would be one instrument, containing the decision of each cause, written on separate paper for the purpose of being applied to the separate causes.

By an order of reference at nisi prius, a general verdict was found for the plaintiff in a cause in which there were several issues, subject to the award or certificate of an arbitrator, "the costs of the cause to abide the event," and the arbitrator, by his certificate, directed that the verdict found should stand, and the damages be reduced to a certain sum: Held, on motion to set aside the certificate, that a specific finding on each issue was not necessary.

Where a Judge's order, made by consent of the parties, in a cause in which it was not clear that issues had been joined, authorized "final judgment or judgment as in case of nonsuit, to be signed by the plaintiff or defendants, as the case may be, or in such manner, or upon such terms, as may be decided by the award or certificate of the arbitrator;" the Court refused, on motion to set aside a certificate of the arbitrator "that final judgment should be signed for the defendants in this cause," as being uncertain, and not specifically disposing of the issues.

It appeared upon the affidavits in support of the rule, that the first action was in indebitatus assumpsit for work and labour, goods sold and delivered, and money due on an account stated; to which the defendant had pleaded: first, the general issue; secondly, payment; and thirdly, a The plaintiffs joined issue on the first plea, and traversed the two others, on which issues were joined. The second was a cross action in special assumpsit. The first count was for a breach of contract in not making an iron retort; and the second count was for breach of contract in supplying an insufficient iron retort. The defendants pleaded: first, the general issue; secondly, and thirdly, as to the first count, traverses of certain allegations in the declaration; fourthly, as to the first count, performance; fifthly, as to the first count, that the defendants delivered a certain iron retort, which the plaintiff accepted in satisfaction and discharge of their promises; sixthly and seventhly, to the second count, traverses of allegations in that count. Issue was not joined in the second action until after the making of the order of nisi prius, presently mentioned; and it did not appear what was the form of replication. When the first mentioned action came on to be tried at the sittings after Easter Term, 1848, at Westminster, a verdict was taken for the plaintiffs by consent, subject to the certificate of a gentleman at the Bar; to whom the cross action was at the same time referred by the following order of nisi prius:

Smith and Another against by and with the consent of the Reece. by and with the consent of the parties," &c., "that the jury find a verdict for the plaintiffs, damages 150L and costs 40s., subject to the award or certificate, order, arbitrament, final end and determination of," &c., "to whom this cause and the cross action between the said parties are hereby referred; so as the said arbitrator do make and publish his award or certificate in writing of and concerning the matters thereby referred, ready to be delivered to the said parties," &c., "on

In re SMITH v. REECE, and REECE

SMITH.

In re
SMITH

BEECE,
and
RECE
SMITH

or before the fourth day of Trinity Term next; with liberty for the said arbitrator under his hand in writing at the foot hereof to enlarge the time for making his said award or certificate."

The order contained the other usual formal clauses; and provided that, "by and with the like consent, the costs of the causes should abide the event and determination of the said award or certificate."

On the same day, the parties went before a Judge at Chambers, who made the following order:

Reece

v.

Smith and Another.

Smith and Another v.

Reece is referred, pursuant to order of nisi prius.

Dated the 13th day of May, 1848.

"J. Patteson."

On the 17th of July following, the time for making the certificate having been duly enlarged, the arbitrator made the following certificates on separate pieces of paper:

"In the Queen's Bench.

"Between William Smith and Benjamin English, plaintiffs,

Henry Reece, defendant.

"I hereby certify that the verdict found for the plaintiffs in this cause shall stand, and I direct that the damages therein mentioned shall be reduced to fifty-nine pounds, nineteen shillings, and four pence.

"Witness H. W. B. (Signed) A. S. D."

"In the Queen's Bench.

"Between Henry Reece, plaintiff,

William Smith and Benjamin English, defendants.

"I hereby certify and direct that final judgment shall be signed for the defendants in this cause.

"Dated this 17th day of July, 1848.

"Witness H. W. B. (Signed) A. S. D."

Knowles and Webster now shewed cause. First, the arbitrator had power to make two certificates; one under the order of nisi prius, the other under the Judge's order referring the second action. But it is not necessary to contend that he had this power, as it does not appear that there are two certificates; and if in effect they amount only to one, it cannot signify that, for the sake of convenience, they are on two separate pieces of paper. They may have been written on one, and divided afterwards. Secondly, the award of final judgment, to be signed for the defendants in the second action, is no excess of authority; as power is expressly given by the Judge's order, which is made by consent of both parties. And this forms an answer also to another objection, namely, that the issues in the second action are not specifically disposed of. Thirdly, the issues in the first cause were sufficiently disposed of, by the certificate of the arbitrator that the verdict for the plaintiffs should stand. In the case of Kilburn v. Kilburn (a), which will, no doubt, be relied on in support of the objection, no verdict was taken. In Brooks v. Parsons (b), it is true, a verdict was taken, but the terms of the reference there were special, which distinguishes that case from the present. The same answer, in addition to the one above given, applies to the objection, namely, that the issues in the second action were not specifically disposed of. Besides, it does

In re SMITH v. REECE, and REECE v. SMITH.

⁽a) 13 M. & W. 671; S. C. ante, vol. 2, p. 633.

⁽b) Ante, vol. 1, p. 691.

In re SMITH v. REECE, and REECE v. SMITH. not appear that there were any issues joined in the second action. Waddle v. Downman (a), and Adam v. Rowe (b), are authorities to shew that the certificate is sufficient. [They referred also to Bourke v. Lloyd (c); Dresser v. Stansfield (d), and Cromer v. Churt (e).]

W. H. Watson (with whom was Wilkins, Serjt.), in support The arbitrator had power to make but one certificate in the two actions, and when he had made one of the certificates in question, by signing it in the presence of the attesting witness as his certificate, he was functus officio, and had no power to go on to make the other. These are two separate instruments, for there is an attesting witness to each. The certificate in the second action is bad, in directing "final judgment" to be signed, without saying what judgment is intended. All that the arbitrator had a right to do under the Judge's order, if he found for the defendants, was to direct a judgment of nonsuit. words "final judgment" in the Judge's order applied to a finding for the plaintiff. [Erle, J.—There are the words "or in such manner or upon such terms as may be decided by the certificate of the arbitrator"]. As to the third point, the cases shew that the issues should have been specifically disposed of; Brooks v. Parsons (f); Kilburn v. Kilburn (q); Cooper v. Langdon (h); Bourke v. Lloyd; England v. Davison (i); Pearson v. Archbold (k); Stonehewer v. Far-The case of Waddle v. Downman is distinguishable, as there, by the order of reference, the arbitrator was to find a fact one way or the other, and the verdict to be

```
(a) 12 M. & W. 562; S. C. ante, vol. 1, p. 560.
(b) Ante, vol. 3, p. 331.
(c) 10 M. & W. 550; S. C.
```

² Dowl. 452, N. S.

⁽d) 14 M. & W. 822.

⁽e) 15 M. & W. 310; S. C. div. nom. ante, vol. 3, p. 672.

⁽f) Ante, vol. 1, p. 691.

⁽g) 13 M. & W. 671; S. C. ante, vol. 2, p. 633.

⁽h) 9 M. & W. 60; S. C. 1

Dowl. 392, N. S.

⁽i) 9 Dowl. 1052.

⁽k) 11 M. & W. 477; S. C. 2 Dowl. 1018, N. S.

⁽l) 6 Q. B. 730.

entered accordingly. In Adam v. Rowe, the question turned simply upon what the arbitrator meant in his award, when he spoke of the issue "firstly" joined between the parties. The same objection applies to the certificate in the second action.

Cur. adv. vult.

In re SMITH v. REECE, and REECE

ERLE, J., delivered judgment.—In the first action a verdict was taken for the plaintiffs on all the issues, subject to a reference of this and the other cause, with power to the arbitrator to certify. The arbitrator delivered two papers containing two certificates for the two causes; and it has been objected that he had power to make only one certificate.

The answer is, that it may be intended that the papers were made at the same time; and if so, they would be one instrument containing the decision of each cause, written on separate papers for the purpose of being applied to the separate causes.

It was further objected, that a certificate for "final judgment" for the defendants in the second action was an excess of authority, as it did not specify the kind of judgment; but the answer is, that the Judge's order, which had been made to increase the power of the arbitrator in this action, authorizes a certificate in these terms.

It was further objected, that each issue in the first cause was not disposed of by certifying that the verdict found for the plaintiffs should stand; such verdict being in effect stated in the order of reference to be on all the issues; and it was contended, first, that all the issues did not comprise each issue, for which *Brooks* v. *Parsons* was cited; and secondly, that non assumpsit was divisible, where there were several counts, as in this case, and should be specifically disposed of in respect of each count; for which *Kilburn* v. *Kilburn* was cited.

The answer is, that the decision of all the issues, is a decision of each; and the decision of the whole of one

In re
SMITH

B.
RECCE,
and
RECCE
SMITH.

issue, is a decision of all the parts of that one. In Brooks v. Parsons (a), there appears to have been one count and two pleas, each of which were necessarily disposed of by the award for the plaintiff; and I am not aware of any other decision that a specific finding on each issue is necessary, when a general finding disposes of each issue without possible ambiguity; and Cooper v. Langdon (b); Williams v. Moulsdale (c); Dresser v. Stansfield (d); Stonehewer v. Farrar (e), per Lord Denman; Hunt v. Hunt (f); Avelett v. Goddard (g), tend to a different conclusion; and Adam v. Rowe (h) shews that a finding for the plaintiff on a divisible general issue comprises each sub-division thereof.

Here the certificate adopts in terms the finding of the jury, and so should be as operative as a verdict; Cromer v. Churt (i). For this reason the present case is distinguishable from Kilburn v. Kilburn (k), where the award was of a sum of money, without in terms deciding the issue; and it appears to me probable that, on this ground, there is a distinction between the present case and Brooks v. Parsons.

It was further objected, that a certificate for final judgment for the defendant in the second action was uncertain, because there were a number of pleas, each of which required to be specifically disposed of; but there are several answers:—

First, that the Judge's order in this case specifically authorizes this finding.

Secondly, that it is not clear that issues had been so joined as to be capable of being specifically disposed of; see Wynne v. Edwards (l); Eardley v. Steer (m).

- (a) Ante, vol. 1, p. 691,
- (b) 9 M. & W. 60.
- (c) 7 M. & W. 134.
- (d) 14 M. & W. 822.
- (e) 6 Q. B. 730.
- (f) 5 Dowl. 442.

- (g) 11 L. J., N. S. C. P. 123.
- (h) Ante, vol. 3, p. 331.
- (i) 15 M. & W. 310.
- (k) 13 M. & W. 671.
- (l) 12 M. & W. 708.
- (m) 4 Dowl. 423.

Thirdly, that a general finding for the defendant would be intended to be on all the issues; Cooper v. Langdon.

Fourthly, that if the costs of certain issues were left in uncertainty, it would be better to hold the award valid, subject to the successful party allowing to his opponent the costs of all such issues; see Morgan v. Smith (a); England v. Davison (b); Leeming v. Fearnley (c). This method is preferable to holding the award void, as it would prevent waste of costs, and for other causes.

1849. In re SMITH REECE, REECE o. Smith.

Rule discharged.

- (a) 1 Dowl. 617, N. S.
- (b) 9 Dowl. 1052.

(c) 5 B. & Ad. 403.

PHILLIPS v. DON.

BUTT moved to enter an exoneretur on the bail piece Where an which had been given in this action, on the ground of a variance in the statement of the cause of action in the Judge's order for arrest affidavit to hold to bail, and in the declaration.

It appeared that a Judge's order had been obtained c. 110, a. 3, under the 1 & 2 Vict. c. 110, s. 3, for a capias to issue stated the debt to be on "a against the defendant; and accordingly, upon that writ bill of exissuing, a bail bond had been entered into, and the de- the declaration fendant released. The affidavit of debt upon which the "foreign bill of exchange;" the Court indebted to the plaintiff in 60L, as indorsee of a bill of refused, on exchange. The declaration, which had been since delivered, was on a foreign bill of exchange.

obtain a under the motion, to discharge the bail, on the ground of variance,

Butt now submitted, that the debt in the affidavit being on a bill of exchange, and the declaration on a foreign bill PHILLIPS

to.

Don.

of exchange, there was such a variance between the cause of action sworn to, and the one now declared on, as entitled the bail to be discharged. There is no doubt, that where a substantial difference does exist, the bail are discharged (a); and the one question is, does such a difference exist in the present case? [Erle, J.—Is not the term "bill of exchange" nomen generalissimum, and, therefore, including a foreign bill of exchange?] In Armani v. Castrique (b), the plaintiff declared upon a bill of exchange, and it was held that that must mean an inland bill. So here the affidavit describes the cause of action as on a bill of exchange, which must mean an inland; whilst the declaration is on a foreign bill of exchange.

ERLE, J.—The statement in the affidavit must be taken with reference to the ordinary meaning of the language used; and I do not think, that on a statement that the defendant is indebted to the plaintiff on a bill of exchange, it is any variance that the declaration should describe it as a foreign bill. At any rate, it is not such a variance as will discharge the bail.

Motion refused.

⁽a) See 1 Chit. Archb. 631, 7th ed.; 792, 8th ed.

⁽b) Ante, vol. 2, p. 432; S. C. 13 M. & W. 443.

1849.

JONES v. PRITCHARD.

(The same Plaintiff against the same Defendant in six other actions.)

THIS was a rule calling upon the plaintiff to shew cause why all proceedings in the above actions, except in the one to which the defendant had appeared and pleaded, should not be stayed until after the trial of that one.

Where the plaintiff has brought set different actions for set different put of the control of the

It appeared that the plaintiff had brought seven different same libel, actions against the defendant, for seven distinct publications of the same libel to different persons. That the defendant ordered proceedings to be amongst others, a plea of justification.

Sir F. Thesiger shewed cause. There is no authority for had been tried. this application. The Court will only stay proceedings in cases where a second action is vexatiously or oppressively brought for the same cause. Here, each act of publication is a distinct offence. Each action is, therefore, for a different cause, and the result of one would not decide the others.

Cockburn and Tomlinson, in support of the rule. The cases in which the Court will interfere to stay proceedings in several actions, are to be found collected in 2 Chit. Archb. 1203, 8th ed. There is no case precisely in point; but rules of equitable expediency like the present, must apply to shifting circumstances. The plaintiff can have no object, but that of vexation, in bringing separate actions for what he might have included in one. If the plaintiff were to succeed in one, and recover substantial compensation, he would only be entitled to nominal damages in the others. That shews that the object is merely to visit the defendant with costs. Where two or more actions are brought by the same plaintiff against different defendants on the same

Where the plaintiff had brought seven different actions for seven different publications of the same libel, against the same defendant; the Court ordered proceedings to be stayed in all the actions, except one, until that one had been rised.

JONES

O.

PRITCHARD.

policy of insurance, the Court will order them to be consolidated at the instance of the defendants; Hollingsworth v. Brodrick (a). Where three actions were brought against three obligors of a joint and several bond, conditioned for the good behaviour of the manager of a joint stock banking company, the Court, after the declarations were delivered, on motion by the defendants, ordered that, the plaintiff proceedings in whichever of the actions he should select, proceedings in the other two should be stayed until the first was tried, the defendants undertaking to be bound by the event of the cause first tried; Anderson v. Tovogood (b).

Cur. adv. vult.

ERLE, J., afterwards delivered judgment.—It appeared that seven actions were brought for the same alleged libel published to different persons, which might have been comprised in one action; and the defendant has moved that the proceedings shall be stayed in all, except one, until that one shall have been tried.

It is clear that the multiplying of actions which might be combined, is a great waste of cost and time; and the plaintiff has not alleged that any purpose would be obtained by the course he has already adopted, beyond imposing the cost of litigation on the defendant. If there is authority for it, there can be no doubt that the application is well founded in reason. The case of Anderson v. Towgood, and the practice of consolidating actions against insurers, were referred to as precedents.

In Girling v. Alders (c) it is said, that as the plaintiff might have joined all his causes of action in one action, he ought to have done so, and not put the defendant to unnecessary vexation. And in $Re\ Aykroyd\ (d)$, the Court citing that case, speak of the reason as satisfactory, and decide against the right of bringing several actions in the

⁽a) 4 A. & E. 646; S. C. 6 N. (c) 1 Ventr. 73. & M. 240. (d) 1 Exch. 479; S. C. cate, (b) 1 Q. B. 245. vol. 5, p. 701.

County Court for matters which might be united in one action in the superior Courts; because the County Court could give no adequate relief by consolidating them in the exercise of their equitable jurisdiction, as a superior Court would. This appears to me sufficient authority. I am, therefore, of opinion that the Court has the power, and ought to make the rule absolute.

Jones

o.

Pairchard.

Rule absolute.

In re an Arbitration

Between SAMUEL LLOYD the Younger, and Others,

and

JOSEPH SPITTLE.

In re an Arbitration

Between Samuel Addison

and

JOSEPH SPITTLE.

In the first mentioned case, a rule had been obtained in By a deed of Arbitration Michaelmas Term last, calling upon J. Spittle to shew cause why he should not pay a sum of 888 L. 5s. under an award.

By a deed of Arbitration between S. L. and J. S., after reciting that J. S. had com-

It appeared that by a deed of submission made between passes upon.

Lloyd and Others, his partners, of the one part, and worked the coal of J. Spittle of the other part, after reciting that J. Spittle certain mines belonging to

By a deed of arbitration between S. L. and J. S., after reciting that J. S. bad committed trespasses upon, and worked the coal of certain mines belonging to S. L., it was

S. L, it was referred to two arbitrators to award what amount should be paid by J. S. for these injuries; "the costs and charges of the agreement, and the costs, &c., of and attending or incident to the arbitration or award, including the payment to be made to the said referees and their umpire," &c., "to be borne and paid by J. S., and to be awarded accordingly." The award found the amount to be paid by J. S. for the value of the injuries to be 8881. 5s.; and that the costs incident, &c. to the award, "including the payment to be paid to us the said referees, amounting in the whole to the sum of 361. 16s. 4d., should be paid by the said J. S. to Mr. J. O., at the office of," &c., "on the delivery of this our award." There was no mention made as to the costs of the agreement of reference. A rule having been obtained calling on J. S. to shew cause why he should not pay the sum of 8881. 5s.: Held, that it was no answer that the costs of the agreement of reference were not included in the award; or that the costs of the reference and the award were awarded in one sum; or that they were awarded to a stranger: as the damages were clearly separable from the costs; and the award might be enforced as to the former, without reference to the latter.

Where the time for making an award had been duly enlarged, but by mistake appeared in the recital of the award to have been enlarged after the time for doing so had expired: *Held* no ground for refusing to enforce the award.

In re LLOYD and SPITTLE.

had committed certain trespasses upon, and had worked and gotten the coal out of certain mines, the property of Lloyd and his partners, it was referred to two arbitrators, and, in case of their difference, to an umpire, to award and determine what amount should be paid for the injuries so sustained and the expenses of proof, and to settle the matters in dispute. There was a clause in the deed to the following effect: "And the costs and charges of this agreement, and the costs and charges and expenses of, and attending or incident to the said arbitration or award, including the payment to be made to the said referees and their umpire, and for any proofs that may be required by them, shall be borne and paid by the said J. Spittle, and shall be awarded accordingly." The award was made by the arbitrators on the 30th of March, 1830, who awarded "that the said J. Spittle shall pay, or cause to be paid, unto the said S. Lloyd, J. F. Foster, L. Foster and S. Lloyd, on the 1st day of May, 1848, between the hours of nine and twelve in the forenoon, at the office of Mr. C. Hunt, situate in Wednesbury, the sum of 888L 5s., as and for the value of the coal worked and gotten by the said J. Spittle from and under the said two pieces of land at Kingshill, in the said parish of Wednesbury," &c., "belonging to the said S. Lloyd, J. F. Foster, L. Foster, and S. Lloyd, after deducting therefrom the expenses of carrying and raising, but not of working and getting the same; and for the expenses incurred by them, the said S. Lloyd, J. F. Foster, L. Foster, and S. Lloyd, in proving the several trespasses committed by the said J. Spittle; and that such sum of 8881. 5s. shall be accepted by the said S. Lloyd, J. F. Foster, L. Foster, and S. Lloyd, in full satisfaction thereof accord-And we do further award that the costs, charges, ingly. and expenses of, and attending or incident to the said arbitration or award, including the payment to be made 'to us, the said referees, amounting in the whole to the sum of 36l. 16s. 4d., shall be paid by the said J. Spittle to Mr. John Orion, at the office of Messrs. Ingleby and

Wragge, in Bennett's Hill, Birmingham, on the delivery of this our award."

In re
LLOYD
and
SPITTLE.

Hugh Hill now shewed cause. It is submitted that the award is bad, or, at any rate, its validity is doubtful; and the Court will not, unless an award be clearly good, enforce it by a motion of this kind, but will leave the parties to their remedy by action. By the agreement of reference, "the costs and charges of this agreement," &c., are to be borne and paid by J. Spittle, "and shall be awarded accordingly." That must mean that they shall be "ascertained," and awarded. The award, therefore, is bad for not awarding the costs of the agreement of reference. Secondly, it is bad for awarding the costs in one entire sum, those which might be due to the arbitrators, and those which might be due to the other party; Robinson v. Henderson (a). Thirdly, it is bad for awarding the costs to be paid to a stranger; Dyer, 242, (a). [Erle, J.—The rule does not call upon Spittle to pay the costs, but merely the amount awarded by way of damages.] It renders the award not final; Wykes v. Shipton (b). [Erle, J.-By the agreement of reference, Spittle is to pay the costs at all Can he complain now that he is not called on to pay them? In all the cases in which an objection like this has been taken, it has been by the party who was entitled to the costs.] The objection is often taken on applications to set aside an award. Here, the Court is only asked not to enforce it.

Lush, in support of the rule. No objection is made to the award as far as the amount awarded in respect of the subject-matter is concerned, and the award is only sought to be enforced as to that sum. It is not contended that

⁽a) 6 M. & S. 276.

⁽b) 3 N. & M. 240; S. C. 8 A. & E. 246, n. (a).

In re
LLOYD
and
SPITTLE.

the objections taken would be any ground for setting aside the award; and, therefore, they can be no answer to this application. The finding as to the costs may be separated from the rest of the award. In Bedam v. Clerkson (a), the arbitrator awarded a sum to be paid to a stranger; but although the award as to that was bad, the Court held the award as to the rest sufficient. The case in Dyer, 242 (a), was not where the costs merely of the award had been directed to be paid to a stranger.

Cur. adv. vult.

In re Arbitration between Addison and Spittle.

In this case a similar rule had been obtained to that in the former case. A similar deed of submission had been entered into, and a similar award (b) made, directing the payment of 1334l. 9s., and a sum of 37l. 3s. 4d. for costs, in the same terms as in the former award. The time for making the award had been duly enlarged at the proper period; but in the recital of the award it appeared to have been made after the time for so doing had elapsed.

H. Hill now shewed cause, and renewed the objections taken in the former case. There is this further objection, that here the award is bad on the face of it; the time for making it, appearing to have been enlarged, after the time limited for doing so, had expired. It is true, that upon referring to the rule of Court, the mistake appears; but in Berney v. Read(c) it was held, that a rule making an agreement of reference a rule of Court, is not evidence of the agreement to refer.

- (a) 1 Ld. Raym. 123.
- not noticed in the judgment, it
- (b) There was a slight difference in the award, but as it was
- is here omitted. (c) 7 Q. B. 79.

Lush was heard in support of the rule. With reference to the last objection, the Court, it is submitted, will not give any effect to it, as the agreement of reference has been made a rule of Court; and that could only be done upon an affidavit of the time for making the award having been duly enlarged.

In re LLOYD and SPITTLE.

Cur. adv. vult.

ERLE, J., afterwards delivered the following judgments.

In re Arbitration between LLOYD and SPITTLE.

On shewing cause against a rule for payment of damages awarded, it was contended that the validity of the award was doubtful; because the costs of the agreement to refer were not included in the award, and because the costs of the reference and the award were awarded in one sum, and because they were awarded to a stranger.

It is not necessary to decide whether these objections are valid, because the motion is made only in respect of the damages without the costs.

If the fact is that this award is defective in the part relating to costs, it is so far a relief to the defendant, as he is by the submission made liable to them at all events; and where the damages are clearly separable from the costs, there are authorities for enforcing the award for the damages, either without the costs, or on condition of allowing the costs, said to be undisposed of, to the opponent; Morgan v. Smith (a); England v. Davison (b); In re Leeming and Fearnley (c).

⁽a) 1 Dowl. 617, N. S.; S. C.

⁽b) 9 Dowl. 1052.

⁹ M. & W. 427.

⁽c) 5 B. & Ad. 403.

1849. In re LLOYD and SPITTLE.

In re Arbitration between Applison and Spittle.

In this case there is the same answer to the same objections, and to the additional objection, that the date of the enlargement of the time is misrecited in the inducement to the award.

The answer is, that the recital is evidence only, and is not an essential part of the award; and, as in truth the enlargement was valid, this mistaken recital is no ground for refusing to enforce the award.

Rule absolute in both cases.

HOLMES v. The LONDON and SOUTH WESTERN RAILWAY COMPANY.

(In the full Court).

An affidavit in support of a motion to set aside a judgment for irregularity, stated that the judgment was signed "this day." Held, that the jurat of the affidavit might be looked to in order to fix the date.

The words "at the return of any such writ," in the

THIS was a rule calling on the defendants to shew cause why the judgment signed in the above cause, and all subsequent proceedings, should not be set aside for irregularity.

The affidavit, upon which the rule was obtained, stated "that the writ of trial in this cause was issued on the 4th of November last, and that the day originally inserted for the return of such writ was the 8th of January, 1849; that notice of trial was given for the 14th of December last; that the trial was put off from the said 14th of December last to the 4th of January instant, in consequence of the want of time to try the action on the first mentioned day,

18th section of the 3 & 4 Wm. 4, c. 42, mean at the return day named in the writ.

Therefore, where upon a writ of trial before the sheriff, the verdict was returned for the defendant, who proceeded to tax his costs and sign judgment, before the return day named in the writ, although after the actual return of the writ by the sheriff: Held, that the judgment so signed was irregular.

The sheriff has no power to accelerate or postpone the return of a writ of trial.

and that the plaintiff obtained an order to amend the teste and return of the writ, in pursuance of which he altered the date of the return of such writ from the 8th to the 22nd of January instant; that he, this deponent, designedly named the said 22nd of January as the return day, in order RAILWAY Co. that in the event of a verdict being found for the defendants, the plaintiff might, before the defendants could sign judgment, obtain funds to pay the costs; that the cause was tried on the 4th of January instant, and a verdict found for the defendants; that on the 12th of January instant, the plaintiff's attorney was served with notice of taxing costs; and that he, this deponent, did, on this 13th of January, previous to making this affidavit, search the judgment book in the office of the Masters, and found that judgment was signed against the plaintiff by the defendants this day; that no certificate for speedy execution was granted by the sheriff." The jurat was in the following form,-" Sworn, at my Chambers," &c., "this 13th day of January, 1849. Before me, W. ERLE."

1849. HOLMES LONDON and Sourn WESTERN

Helps shewed cause. There is a preliminary objection. The affidavit does not show the date when the judgment, which it is sought to set aside, was signed. It merely says "this day," but no date is added. The jurat cannot be referred to, to aid this defect; as was decided by this Court in the present Term, in Foster v. Tattersall (a). There the

(a) FOSTER v. TATTERSALL.

Cor. Lord Denman, C. J., Patteson, J., Coleridge, J., and Wightman, J.

ON the second day of the present Term,

Pashley moved to set aside the writ of summons in this cause, and the copy and service thereof, for irregularity. The affidavit upon which the motion was made stated, that "on Monday, the 4th of December instant, he, the deponent, was served with the paper writing hereunto annexed, marked (A)., purporting to be a writ of summons," &c. The jurat was in the usual form, "Sworn at," &c.,

Holmes

to C.

London and South Western Bailway Co.

date in the affidavit was described as "Monday, the 4th of December instant;" and it was held that the jurat could not be referred to to shew that the month of December, 1848, was meant. That case was decided on the authority of a previous case of Hughes v. Browne (a), and the decision, it is submitted, is correct in principle. The deponent may swear to the affidavit and go away, and the jurat be added afterwards. In point of fact, he seldom sees the jurat. How could an indictment for perjury be framed on an affidavit where the only date referred to is that of the jurat, which is a statement made by an officer of the Court, and for the correctness of which the deponent ought not to be held liable.

Should, however, the Court be of opinion that the affidavit is sufficient, the judgment, it is submitted, is regular. The writ of trial was, in point of fact, returned before the judgment was signed. The 3 & 4 Wm. 4, c. 42, s. 18,

"the 5th day of December, 1848, before me, C. D., a commissioner," &c. A similar application to the present had been made to a learned Judge at Chambers, when a preliminary objection was taken that the affidavit was defective, in not containing a date; and the case of Hughes v. Browne, ante, vol. 1, p. 788, was relied on in support of the objection; and the learned Judge, on the authority of that case, refused the application. It is submitted that the affidavit is sufficient. The word "instant" refers to the month in which the affidavit was sworn, and the jurat shews that that was the "month of December, 1848." The Court will assume that the commissioner has done his duty, and affixed the jurat at the time when the affidavit was actually sworn; and the deponent swearing in the month of December, 1848, to a fact as happening "on the 4th of December instant," would be guilty of perjury; if he knew that it did not take place in that month of that year. [He referred to Prince v. Nicholson, 5 Taunt. 333.]

The Court said (b), that however unwillingly they might yield to the objection, they were bound to do so, as there was authority for it; and that, as observed by Maule, J., in the case of Hugkes v. Browne, the jurat was no part of the affidavit, and the deponent might never have seen it.

Rule refused.

- (a) Ante, vol. 1, p. 788; S. C. 6 M. & G. 751; 7 Scott, N. R. 517.
- (b) Lord Denman, C. J., Patteson, J., Coleridge, J., and Wightman, J.

1849.

HOLMES

enacts, "that at the return of any such writ of inquiry, or writ for the trial of such issue or issues as aforesaid, costs shall be taxed, judgment signed, and execution issued forthwith, unless the sheriff," &c., "shall certify" "that judgment ought not to be signed," &c. It is true that the return day of the writ had not then arrived; but it is submitted, that the actual return of the writ is sufficient to justify signing judgment according to the words of the statute. [Wightman, J.—Can the sheriff return the writ before the return day? According to that, it would give him the power of ordering speedy execution.] The intention of the act is to favour speedy execution. In Billing v. Railton (a), where the plaintiff, issuing a writ of trial, had made it returnable on the first day of Easter Term following, and the trial was had on the 16th of January, and a verdict returned for the defendant; the Court, on the motion of the defendant, ordered the sheriff to return the writ forthwith. In Nicholls v. Chambers (b), the plaintiff having obtained a verdict on a writ of trial before the sheriff. taxed his costs, and signed judgment the same day; and it was held that the judgment was regular. In that case it is true, the same objection as is taken here, was not raised; nor does it appear from the report when the writ was returnable.

LONDON
and SOUTH
WESTERN
RAILWAY CO.
to
the
writ
give
cenling
rial,
cerm
ary,
on
urn

Joyce, in support of the rule. As to the objection that the jurat cannot be looked to to supply the defect of date in the affidavit, if it be held valid, scarcely any affidavit will be found to be correct, and numerous applications will be made to set aside proceedings for similar defects. The objection, it is understood, has been taken in the Courts of Exchequer (c) and Common Pleas, since the case of Foster v. Tattersall (d), and has not prevailed. There would be no difficulty in indicting a party for perjury on such an

⁽a) Ante, vol. 2, p. 771. (b) 1 Cr., M. & R. 385; S. C. 2 Dowl. 693. (c) See Craig v. Lloyd, ante, p. 487. (d) Ante, p. 537, n. (a).

Holmes

o.

London
and South
Western
Railway Co.

affidavit. It is desirable that one uniform practice should be adopted in all the Courts on this subject.

Lord Denman, C. J.—We will consult the Judges of the other Courts upon this preliminary objection, before we hear you further in support of the rule.

Cur. adv. vult.

Afterwards, on the last day of Term,

Lord Denman, C. J., said, in the case of Foster v. Tattersall (a), we were referred to a case of Hughes v. Browne (b), as deciding that the jurat of an affidavit cannot be looked at to supply a date omitted in the body of the affidavit. In consequence, however, of its since being intimated to us that the Judges of the other Courts entertained some doubts concerning the propriety of our decision, our Brother Wightman has spoken to the Judges of the other Courts, and they all concur in opinion that the jurat may be looked to for the date of a fact in the My Brother Maule says, that the report of Hughes v. Browne is mistaken with reference to the facts of that case (c). Our wish in deciding Foster v. Tattersall was to accommodate our practice to what we understood to exist in the Common Pleas. At all events, the only result of that case must have been to ensure a greater degree of accuracy, and no inconvenience was likely to ensue.

Patteson, J., Coleridge, J., and Wightman, J., concurred.

Joyce was then heard in support of the rule upon the other point. The "return" of the writ of inquiry, men-

⁽a) Ante, p. 537, n. (a).

⁽c) See Abrahams v. Davison, since reported, 6 C. B. 622.

⁽b) Ante, vol. 1, p. 788; S. C. 6 M. & G. 751; 7 Scott, N. R. 517.

tioned in the 18th section, means the day on which the writ is made returnable; and the sheriff has no power to return the writ before the day on which it is made return-In Billing v. Railton (a), the plaintiff had departed from the usual practice, and made the writ returnable on a distant day. No doubt, in such a case, where the Court sees that the object is to prejudice the defendant, in the case of the verdict being in his favour, the Court has power to order the writ to be returned immediately. [Coleridge, J.— There does not appear in that case to have been any order to alter the return day. If the defendant had signed judgment upon the actual return of the writ, would it have been irregular?] It is not necessary for the decision of the present case, to contend that it would. The rule might probably be held, in effect, to alter the return day. Here, however, no sanction of the Court had been obtained to the course pursued. In Nicholls v. Chambers (b), it does not appear that the judgment was signed before the writ was returnable.

Lord DENMAN, C. J.—I am of opinion that the judgment was signed too soon, and that the rule to set it aside must, therefore, be absolute.

PATTESON, J.—I think that the words "at the return of such writ" in the 18th section, mean the "return day" named in the writ. It does not appear to me that the sheriff has any power to accelerate or postpone the return of the writ.

COLERIDGE, J., and WIGHTMAN, J., concurred.

Rule absolute.

HOLMES

U.

LONDON

and SOUTH

WESTERN

RAILWAY CO.

⁽a) Ante, vol. 2, p. 771.

⁽b) 1 Cr., M. & R. 385; S. C. 2 Dowl. 693.

1849.

CROCKFORD v. TUCKER.

Where a cause under a writ of trial stands over from one sheriff's Court to another, on account of the pressure of business, it is the same as where a cause is made a remanet from one sittings in London or Middlesex to another; and in the event of a subsequent default, the defendant is entitled to judgment as in case of a nonsuit; although the return day of the writ of trial is before the day to which the cause stands adjourned, and the plaintiff is obliged to alter the writ and get it resealed.

THIS was a rule for judgment as in case of a nonsuit. It appeared that an action had been brought for goods sold and delivered, and on an account stated; and after issue joined, a writ of trial was obtained, to try the cause before the sheriff of Middlesex. Notice of trial was given for the 6th of May, 1847; the writ being returnable on the 8th. On the 6th of May, the cause was not reached, owing to the pressure of business; and consequently stood adjourned, by the practice of the Court, until the next sitting, which was on the 13th. It was necessary, however, that the return day of the writ should be altered, so as to give the sheriff jurisdiction; and the plaintiff accordingly took away the writ, and having obtained an order from Coleridge, J., for that purpose, altered the return to the 29th of May, re-sealed it, and delivered it back to the sheriff, and gave fresh notice of trial for the 27th of May. The cause was again not reached on that day, and consequently again stood adjourned. The plaintiff, however, had since taken no step whatever in the cause. The present rule was accordingly obtained; against which,

J. W. Saunders shewed cause. The question is whether the plaintiff in this case really has neglected to take the issue to trial according to the course and practice of the Court; and it is submitted that he has not been guilty of any default. Where a cause is made a remanet at the assizes, the defendant cannot have judgment as in case of a nonsuit for a subsequent default, but must take the cause down by proviso. Where it is made a remanet from the sittings in London or Middlesex, to a subsequent sittings, the rule is different; Ham v. Greg (a); but that is because

(a) 6 B. & C. 125; S. C. 9 D. & R. 125.

it is all treated as one sittings, and no fresh entry of the record is required, or fresh notice of trial. Here the writ of trial was required to be altered and re-sealed, and a fresh notice of trial was given. [Erle, J.—I am told that notice of trial for one sheriff's Court is good for the succeeding Court, when the cause was not reached on the first occasion.] Here the writ had to be altered and re-sealed, and was like a new writ.

CROCKFORD
v.
TUCKER.

Simon, in support of the rule, was stopped by the Court.

ERLE, J.—It appears to me, that a cause standing over from one sittings at a sheriff's Court to another, is like a cause standing over from one sittings in London or Middlesex to another; and that the issue cannot be said on the first occasion to have been brought to trial, so as to preclude the defendant from obtaining judgment as in case of a nonsuit, on a subsequent default. I am told that it is not necessary in such cases to give a fresh notice of trial. No doubt, where the return of the writ requires an alteration, the plaintiff must make it; and he may take the writ away and alter it, and re-seal it, and the sheriff is bound to accept it back again, without any fresh fee, because it is a continuing writ. The present case, therefore, comes within the principle of Ham v. Greg, and the plaintiff having made default, the defendant is entitled to judgment as in ease of a nonsuit. Under the circumstances, however, the rule may be discharged, on a peremptory undertaking being given.

Rule accordingly.

1849.

DOR dem. SMITH v. ROE.

Since the 1 & 2 Vict. c. 110, s. 18, giving to rules of Court for the payment of money the effect of judgments, a party in execution on a rule of Court for the payment of costs under 20L, is entitled to the benefit of the 48 Geo. 3, c. 123, s. 1.

B. C. ROBINSON moved for a rule to discharge the lessor of the plaintiff out of custody, under the 48 Geo. 3, c. 123, s. 1; he having been in prison for more than twelve months on an execution under 201.

In this case, the lessor of the plaintiff had recovered judgment in the above action of ejectment, had issued a writ of possession, and had ruled the sheriff to return the writ. On the rule coming on to be heard, it appeared that the judgment had been set aside before the rule was obtained; and the Court accordingly discharged the rule, with costs to the sheriff. Those costs had been taxed at an amount under 20L, and the lessor of the plaintiff taken in execution for them, and he had been in prison for upwards of twelve months. Notice had been given to the sheriff of the intended application.

B. C. Robinson now moved for a rule absolute in the first instance. The only question is, whether these being costs under a rule of Court, the statute applies; and it is submitted that it does. The statute says, "all persons in execution upon any judgment" "for any debt or damages not exceeding the sum of 20L, exclusive of the costs," &c.; but it has been held to apply to the case of a plaintiff who is in execution for the costs of a nonsuit (a). By the recent statute, 1 & 2 Vict. c. 110, s. 18, rules of Court for the payment of money have the force of a judgment; and therefore, by a parity of reasoning, it would seem equally to apply to a case like the present.

Cur. adv. vult.

⁽a) See Roylance v. Hewling 3 M & S. 282; Bradley v. Webb, 7 Dowl. 588.

On the following day,

ERLE, J., delivered judgment.—In this case the lessor of the plaintiff moved to be discharged out of custody under the 48 Geo. 3, c. 123, s. 1, having been imprisoned for upwards of twelve months, under an execution issued on a rule of Court for the payment of costs; and the question is, whether the statute applies to such a case as the present, and I am of opinion it does. Rules of Court for the payment of money have now the effect of judgments; and as the statute has been held to apply to the case of plaintiffs in execution for costs, although it can scarcely be said that there is any debt or damages due from them, I cannot see that the circumstance of these costs being due under a rule of Court, makes any difference. The party is, therefore, entitled to be discharged.

Rule absolute.

In re two Plaints or Actions in the County Court of Hertfordshire,

Between

ROBERT ELLIS, Plaintiff,

and

CHARLES PEACHEY, Defendant.

[This case will be found reported, ante vol. 5, p. 675.]

Ex parte PAYNE.

[This case will be found reported, ante vol. 5, p. 679.]

In re the Arbitration between
The London and North Western Railway Company
and

JAMES B. QUICK.

[This case will be found reported, ante vol. 5, p. 685.] VOL. VI. N. N. D. & L. 1849.

Doe dem. Smith v. Roe. In re an inquiry of Damages and Compensation under the Lands' Clauses Consolidation Act, 1845, Between William Ross

and

THE YORK, NEWCASTLE, and BERWICK RAILWAY COMPANY.

[This case will be found reported, ante vol. 5, p. 695.]

REGINA v. WILLIAM ROBINSON.

[This case will be found reported, ante p. 295.]

COURT OF COMMON PLEAS.

Bilarp Cerm.

IN THE TWELFTH YEAR OF THE REIGN OF VICTORIA.

GELL v. BURGESS.

The first count of the declaration was upon a The general bill of exchange; the second was for money lent, and the The declaration concluded, clusion of a third upon an account stated. in the ordinary form, "to the plaintiff's damage of 101," &c. debt in the

The defendant, who was under terms of pleading issuably, pleaded, first, as to the sum of ten shillings, parcel of the moneys in the first count of the declaration mentioned, and in the declaration also as to the sum of ten shillings, parcel of the moneys in the last count of the declaration mentioned, that the said account in the last count mentioned, so far as the same in debt containing three relates to the said sum of ten shillings, parcel, &c., in the counts, the said last count mentioned, was had and stated of and con-pleaded first to cerning the said sum of ten shillings, parcel, &c., in the of the moneys said first count mentioned, and not otherwise; and that in the first and last count." the said sum of ten shillings, parcel, &c., in the said first and secondly, count mentioned, is one and the same, and not other or of the said different from the said sum of ten shillings, parcel, &c., in the said last count mentioned: and further, that after the held that the

1849.

damage laid at the condeclaration in ordinary form is distributable over the several counts ration.

therefore, to a declaration defendant " to the residue first and last counts;" it was latter plea was an answer, not

only to the residue of the debts mentioned in the first and third counts, but also to the damages for the detention thereof.

GELL.

BURGESS.

accruing of the causes of action in the declaration mentioned, so far as the same relate to the said sums of money in the introductory part of this plea mentioned, and before the commencement of this suit, to wit, on the first day of June, A. D. 1848, the defendant paid to the plaintiff, who then accepted and received of and from the defendant, a large sum of money, to wit, ten shillings, in full satisfaction and discharge of the said sums of money in the introductory part of this plea mentioned. Verification.

Secondly, as to the residue of the said first and last counts, the defendant says that the plaintiff ought not further to maintain his action in respect thereof, because he, the defendant, after the commencement of this suit, to wit, on the 1st day of August, A. D. 1848, paid to the plaintiff, who then accepted and received of and from the defendant, a large sum of money, to wit, fifty pounds, in full satisfaction and discharge of the causes of action in the introductory part of this plea mentioned. Verification and prayer of judgment.

Thirdly, as to the second count, nunquam indebitatus.

The plaintiff signed judgment upon the first and third counts for the damages, on the ground that the first and second pleas answered the debt only, and not the damages for the detention of the debt. *Maule*, J., having made an order at Chambers for setting aside the judgment,

Hoggins moved for a rule to rescind that order. The second plea is pleaded "to the residue of the first and last counts," and consequently, it is submitted, is an answer only to the debts contained in those counts, and not to the damages accruing from the non payment of them. In order to cover the damages as well as the debt, the plea ought to have been pleaded "to the residue of the sums of money in the said first and last counts mentioned, and also of all damages in respect thereof;" Love v. Steel(a);

Henry v. Earl (a). The word "count" means the narration of the claim or cause of action of the plaintiff, and this does not include damages, because these are merely a consequence resulting from the non-satisfaction of the claim, and not properly part of the claim itself. [Maule, J. -The "count," in former times, was a statement of every thing which the countor claimed.] The claim in this case is the debt; the damages arising from its detention form in themselves a distinct subject-matter of claim, and might be recovered in a different action. Thus it has been held that arrears of interest due upon the amount of a bill of exchange might be recovered, although the principal had been paid; Lumley v. Musgrave (b). It is to be observed, moreover, that this second plea is not a plea in bar, but a plea to the further maintenance of the action. The former, denying that any cause of action ever existed, denies, by necessary consequence, that any damage has resulted from it: "If the defendant was not indebted," says Parke, B., in Triston v. Barrington (c), "the plaintiff could not have sustained damages. The plea answers that which is the foundation of the damages." The latter, however, admits the existence of the cause of action, which, in this case, is a debt; and admits, therefore, that some damages have accrued by reason of its detention; such, for example, as the costs of the writ. [Maule, J., referred to Corbett v. Swinburne (d). And, after that admission, it ought distinctly to answer the damages as well as the debt; which, it is submitted, it does not. Triston v. Barrington is not an authority in support of this plea; for the plea of payment, which was in that case held good, was pleaded to the "causes" of action, which term, used in the plural, necessarily referred to something more than the debt alone. [Cresswell, J.-Might not the plaintiff have stated damages

GRLL v.
BURGESS.

⁽a) 8 M. & W. 228; S. C. 9 (c) 16 M. & W. 61, 2; S. C. Dowl. 725. (ante, vol. 4, p. 273.

⁽b) 4 Bing. N. C. 9; S. C. (d) 8 A. & E. 673; S. C. 3 N. 5 Scott, 230. & P. 551.

GELL v. BURGESS.

at the end of each count? and, if so, do not the damages at the end of the declaration belong in effect to all the counts? The commencement of the declaration states that "the defendant owes and unjustly detains," words which are not repeated at the beginning of each count, and yet which apply to each; why should not, in the same manner, the statement of the damages be considered as applying to each count?] If each count had concluded with a statement of damages, the plea would not have been open to the present objection, because it would have answered everything stated on the face of the first and third counts, which had been left unanswered by the first plea. however, there is no averment of damage in the first and third counts. The only plea which answers the damages is the third, but that is pleaded to the second count only; and thus the whole of the damages are attached by the defendant to that count, which denies that the debt, in respect of which the damages are claimed, ever existed. It is clear, however, that some damage must have resulted from the detention of the debts mentioned in the first and third counts, and admitted by the second plea; and as those damages were left unanswered, the plaintiff was entitled to sign judgment for them. If he had not done so, it would have been a discontinuance. Wheeler v. Senior (a) was referred to.]

WILDE, C. J.—It seems to me that judgment was irregularly signed in this case. The damages stated at the end of the declaration are attached to all the claims made in the preceding part of it; for there is nothing in the manner of stating the damages in an action of debt which refers them to any particular part of the declaration. The common form of declaration in debt begins by alleging that the defendant owes and unjustly detains from the plaintiff a certain sum of money, and states the nature of the con-

tract, which is the foundation of the claim, ex. gr., that the debt is due for goods sold and delivered, money lent, &c.; and it concludes by averring that "the said sum of money was to be paid by the defendant to the plaintiff upon request, and by reason of the non payment thereof, an action hath accrued to the plaintiff to demand the same of the defendant," but that "the defendant hath not paid the sum above demanded, or any part thereof, to the plaintiff's damage of 101," &c. Now, to what is that damage to be referred, but to the several matters of complaint previously set forth? If, instead of stating the gross amount at the end of the declaration, a proportion of the damages had been stated at the end of each count, it is admitted that the plea to the first and third counts would have been unobjectionable. But is it not plain that the effect and meaning of this declaration is to attribute to each of the counts so much of the gross damage as may be thought applicable to it? If so, a plea which is pleaded, like the one before us, "to the residue of the first and last counts," answers not only the residue of the claims found in those counts, but also all other matters stated in the declaration, which, in substance, belong to those counts. A plea, therefore, which answers a count, answers the damages included in the count. The commencement of the declaration is the only part which complains of the detention of the debt, and it clearly overrides the whole declaration: in the same way, the damages, which are stated only at the end of the declaration, override the whole of it. I therefore think that the second plea is an answer to the residue of the debts claimed in the first and third counts, and also to the damages for the detention thereof. Judgment was, consequently, irregularly signed; and the order of the learned Judge for setting it aside ought not to be rescinded.

MAULE, J.—A count formerly meant a declaration: it now means something which would be a declaration if it

GELL v. BURGESS.

GELL v. BURGESS.

stood alone. A count, therefore, must include everything which is necessary to constitute a declaration, viz., a good cause of action and damages. The damage stated at the end of the declaration is parcel of each count. A plea to a whole count, therefore, is an answer to the damages as well as to the cause of action comprised in that count; and so a plea to the residue of a count—a part of it having been already answered—applies to the damages in respect of that portion of the cause of action which it answers. The cases which were cited were altogether different from the present one, for the language of the plea in those cases excluded the damages; the plea being in terms pleaded to the debt only.

CRESSWELL, J., and WILLIAMS, J., concurred.

Rule refused.

DEARIE and Others, Assignees, &c. v. R. HENDERSON and Another.

A declaration by the assignees of a bankrupt contained four counts: first, trover for a ship of the bankrupt, converted before bankruptcy. Secondly, trover for a THE declaration in this case contained four counts.

First. Trover for a ship, called the Sir Robert Seppings, with her tackle and cargo, in the possession of Joseph Hughesdon, the bankrupt, and converted by the defendants before the bankruptcy.

Second. A similar count, laying the possession in the assignees, and the conversion after the bankruptcy.

ship of the assignees, converted after bankruptcy. Thirdly, that the bankrupt being sole owner of a ship, for the purpose of indemnifying the defendants against loss in respect of their accepting certain bills of exchange, empowered them by deed to sell the ship, of which purpose the defendants had notice; that the defendants refused to accept the bills, but, contrary to the purpose, &c., sold the ship before the bankruptcy; whereby the assignees lost the possession of the ship, and the freight of her cargo. Fourthly, that the bankrupt empowered the defendants by deed to sell the ship, but at the same time wrote them instructions by letter not to do so, and that the defendants, contrary to their instructions, nevertheless sold the ship; concluding with the same damage as in the third count.

Held, that the first and third, and the second and fourth counts, were for the same causes of complaint, and were in apparent violation of the rule of Hilary Term, 4 Wm. 4, Pt. II. r. 5.

Third. That before the said Joseph Hughesdon became bankrupt, to wit, on the 24th of August, 1847, he, being then lawfully possessed and sole registered owner of a ship called the Sir Robert Seppings, executed a deed poll, dated, &c. This deed, which was set out, empowered the defendants to sell the ship, and to execute all deeds, bills of sale, &c. necessary to complete the purchase, in the name of Hughesdon.] That the said Joseph Hughesdon and A. Mackay sent and delivered the deed poll to the defendants, who first had and received the same, and the authority therein contained, to wit, on the 27th November, 1847; that the said deed poll was sent as aforesaid for the purpose of securing the defendants in respect of the acceptance by them of eighteen bills of exchange then, and before the execution of the said deed poll, to wit, eleven of the said bills on the 6th of August, 1847, and seven on the 17th of the same month [total amount, 14,955l. 15s. 6d.], drawn by the said J. H. and A. M. upon the defendants, and payable to their order, and indorsed by the said J. H. and A. M.; that the defendants received the said deed poll with full notice, and for the purpose aforesaid; and that although the said bills were all presented for acceptance to the defendants before they respectively became due by the respective indorsees and holders thereof, the same were not, nor was any or either of them, at any time, accepted or paid by the defendants, but were refused acceptance and dishonoured by the defendants, and were then duly protested for non acceptance; of which presentment and dishonour the holders gave notice to the said J. H. and A. M., and required them to pay the amounts of the said bills. Breach, that the defendants, after such dishonour, and while they held the said deed poll, for the purposes aforesaid, and before the bankruptcy of J. H. and A. M., contrary to the purposes for which they held the said deed poll, sold the said ship, with her tackle and cargo, to George Henderson and one George Henderson the younger, by a bill of sale executed in the name of the said J. H. by the defendant,

DEARIE and Others
v.
HENDERSON and Another.

DEARIE and Others

T.
HENDERSON and Another.

R. Henderson, as his attorney, before the bankruptcy, and the transfer was completed by the purchasers after the bankruptcy of the said J. H. and A. M.; whereby the plaintiffs, as assignees of the said J. H. and A. M., have been deprived of the possession and use of the said ship, and of divers large sums of money, amounting, to wit, to 10,000L, for freight, which, but for such loss of possession, would have been payable to them as such assignees.

Fourth. That the said J. H. before his bankruptcy, to wit, on the 24th of August, 1847, being possessed and the sole registered owner of a certain other ship, called the Sir Robert Seppings, with her tackle, cargo, &c., of great value, &c., executed a deed poll of the like tenor and effect as the deed poll mentioned in the third count; and that the said J. H. and A. M., before either of them became bankrupt, to wit, on the 4th of October, 1847, wrote a letter to the defendants, stating that they therewith sent the last mentioned deed poll, and instructing the defendants, that although they had sent the said power of attorney to sell, they did not wish the ship to be sold; and that the last mentioned deed poll and letter were delivered to the defendants, who held the said deed poll, subject to the instructions contained in the said letter. Breach, that the defendants, before the bankruptcy of either the said J. H. or A. M., and contrary to the terms of the said letter, sold the last mentioned ship, tackle, &c., to the said G. H. and G. H. the younger, by a bill of sale, executed in the name of J. H. by the said R. Henderson, as his attorney, before the bankruptcy, and the transfer was completed by the purchasers after the bankruptcy of the said J. H. and A. M.; whereby, &c. [the same damage as in the third count.]

The defendant having obtained an order from Coltman, J., requiring the plaintiffs to elect between the first and third, and between the second and fourth counts of the declaration, or to amend the first and second counts by confining them to the cargo;

Peacock moved to rescind or vary that order. These counts are not used in apparent violation of the rule H. T., 4 Wm. 4, s. 5, which orders that "several counts shall not be allowed, unless a distinct subject-matter of complaint is intended to be established in respect of each." The third and fourth counts are not, like the first and second, counts in trover for the ship and cargo; but special counts on the case for wrongfully selling the ship. A breach of duty is the gist of the action in the latter counts: the third count shews that the power of selling the ship was only to arise upon the acceptance and payment of certain bills of exchange; and the fourth count shews a sale contrary to the express instructions of the owner of the ship: these are breaches of duty, for which special damages may be recovered wholly irrespectively of the value of the ship; which is all that can be recovered in trover. This Court held, in Williams v. Archer (a), that in an action of detinue for railway scrip certificates, which were re-delivered after the commencement of the action and before verdict, the jury might, in estimating the damages, take into consideration the difference in value of the certificates at the time of the demand and of the redelivery. [Maule, J.—To prove the third count, must you not shew a conversion? If so, it is included in the first. It is not because the same evidence will prove two counts, that one of them must be struck out. The damages which might be recovered under each might be very different. It was contended in Sheppard v. Hales (b), that the test was whether anything could be recovered under one count which would not be equally recoverable under another; but Pollock, C. B., said, "I do not think the test suggested is the true one. In the very case put in the pleading rule of Hil., 4 Wm. 4, r. 5, freight on a charter party is allowed to be joined with a count for freight pro ratâ itineris; and two such counts might very well be joined with a third on a special contract to pay for

DEARIE and Others
v.
HENDERSON and Another.

⁽a) 5 C. B. 318. S. P. quere S. C. nom. Gilbert v. (b) 13 L. J. N. S., Exch. 333; Hales, ante, vol. 2, p. 227.

DEARIE and Others

HENDERSON and Another.

the goods carried; each would require different pleadings, and different evidence to support them, for they are in fact founded on different rights." And Alderson, B., observed, "The true question is, whether three counts are inserted in apparent violation of the rule, as being substantially for the same cause of action. Here the first set of counts is founded on the law merchant; the second on the law of France, and the third on a contract altogether independent of, and collateral to, the two former sets of counts. These counts do not, therefore, appear to be in violation of the rule, though the fact may be, and probably is, that there was but one contract." So here, it does not appear that the sale mentioned in the third count is the conversion complained of in the first. [Wilde, C. J.—The first count comprises every possible case of conversion, and, consequently, includes the third count, if the sale in that count amounts to a conversion.] It is very doubtful whether it does amount to a conversion. The defendants had authority to sell in a certain event, and they sold although that event did not happen; can they be said, in such a case, to have converted the ship to their own use? If A. authorizes B. to sell goods at a certain price, and B. sells under that price, is not an action on the case, rather than trover, the proper remedy? [Cresswell, J.—The rule of Hilary Term, 4 Wm. 4, declares that "counts founded on one and the same principal matter of complaint, but varied in statement, description, or circumstance only, are not to be allowed." Here the subject-matter of complaint is the sale of a ship under certain circumstances. the first and third counts founded on that same subjectmatter, varied only in the manner in which it is stated?] The same thing might have been said in Sheppard v. Hales (a). [Cresswell, J.—There the counts were upon different contracts. Besides, that was an action upon a bill of exchange, and the rule of Court provides that counts

⁽a) 13 L. J. N. S., Exch. 333; Hales, ante, vol. 2, p. 227. S. P. quære S. C. nom, Gilbert v.

upon a bill, and the consideration for the bill, are to be considered as founded on distinct subjects of complaint.] With respect to the fourth count, it would be difficult to say that proof of the facts there stated would support the second count. It states an authority under seal to sell, and at the same time sets forth a letter, requesting the defend-What is the effect of a sale under such ants not to sell. circumstances? The instrument under seal is not revoked by the latter so as to prevent the agent from making a good title to a purchaser: the principal, therefore, cannot maintain trover against the purchaser. And, if not, can he do so against his agent? Or must he not rather sue him in case, for the breach of duty? It is submitted that the Court cannot see upon the face of this declaration—and for this purpose the particulars cannot be looked at (a) that the counts are in apparent violation of the rule of Court, and that the order of the learned Judge is therefore wrong.

DEARIE and Others v.
HENDERSON and Another.

Wilde, C. J.—The special counts in this case allege that the defendants wrongfully sold a ship, having an apparent, but not an actual, authority to do so. If that be so, they have been guilty of a conversion. It cannot be said that these counts are not founded on the same subject-matter as the counts in trover; and, therefore, although there may be good reason for declaring against the defendants, as the plaintiffs have done, by the special counts, there is none for retaining all the counts. It is the duty of the Judge to look at the counts in a declaration with the eye of a pleader, and to say whether, in his judgment, they are founded on "one and the same principal matter of complaint:" if he thinks they are, he must order them to be struck out, unless the plaintiff satisfies him that some distinct subject-matter of complaint is bonâ fide intended to be established in

⁽a) See Gilbert v. Hales, ante, vol. 2, p. 227. Cahoon v. Burford, ante, vol. 2, p. 234.

DEARIE and Others
v.
HENDERSON and Another.

respect of each count. It is clear to me, that all these counts are founded upon the same subject-matter, and I, therefore, think that the order of the learned Judge ought not to be disturbed.

MAULE, J., CRESSWELL, J., and WILLIAMS, J., concurring.

Rule refused.

Dodd v. Wigley.

The affidavit in support of a rule for entering a suggestion to deprive the plaintiff of costs under the County Courts' Act, must shew that the case does not fall within the three exceptions in the 128th section of the County Courts' Act.

DEBT for work, attendance, and services of the plaintiff, as a surgeon and apothecary, for goods and medicine sold and delivered, and upon an account stated. Plea, nunquam indebitatus. Upon the trial before the secondary of London, on the 1st of December, 1848, the plaintiff obtained a verdict for 2l. 10s., and judgment was signed on the 9th of the following month.

On a former day in this Term, Joyce obtained a rule, calling on the plaintiff to shew cause why the judgment should not be set aside, and why the plaintiff should not bring in the record, and the defendant be at liberty to enter a suggestion thereon to deprive the plaintiff of his costs. The material portions of the affidavit upon which the rule was obtained, were as follows:

That the cause of action herein did arise, in some material point, within the jurisdiction of the Westminster County Court of Middlesex, in which the defendant dwells, and carries on his business; and that all the medicines, except to the amount of 10s., were delivered to the defendant, at the Union Club House, Trafalgar Square, Middlesex, which is within the jurisdiction of the Westminster County Court, and is the place where, before and at the commencement of this suit, the defendant was and is employed, dwells and carries on his business; and that the plaintiff

does not, nor did he at the time of the commencement of this suit, dwell more than twenty miles from the defendant, for that the plaintiff is, and then was, a surgeon, dwelling and carrying on business at the Westminster Bridge Road, Lambeth, in the county of Surrey; and that the defendant is a clerk to the Union Club, and resides and dwells at the Union Club House aforesaid, which is within the jurisdiction of the said Westminster County Court of Middlesex, and the places of residence last aforesaid are less than two miles from each other; and that all the items, except to the amount of 10s., were by the said plaintiff's witnesses proved to have been so delivered to the defendant at the Union Club aforesaid; and that neither the said plaintiff nor the defendant is an officer of the said Westminster County Court of Middlesex, nor was any officer of the said County Court a party, directly or indirectly, concerned in the matters in question in this cause.

G. T. White shewed cause. The affidavit is insufficient. The 129th section of the County Courts' Act (9 & 10 Vict. c. 95) deprives a plaintiff of his costs if he sues in the superior Courts instead of proceeding in the County Court; and the 128th creates three exceptions to this general rule, viz., first, where the plaintiff lives more than twenty miles from the defendant; secondly, where the cause of action did not arise wholly, or in some material point, within the jurisdiction of the Court within which the defendant dwells, or carries on his business, at the time of the action brought; and thirdly, where an officer of the County Court is a party. Now the affidavit does not shew that the case does not come within the second or the third exception, which it is

necessary it should do; Matthew v. Broughall (a); Meetan

Dodd Dodd v.

v. Nicholls (b). The affidavit merely states that the cause
(a) Ante, vol. 5, p. 791; S. C. 5 C. B. 937.

⁽b) Ante, vol. 5, p. 799; S. C. 5 C. B. 848.

Dond v. Wigley.

of action arose within the jurisdiction of the Westminster County Court, "in which the defendant dwells and carries on his business," a statement quite consistent with the fact that the defendant did not dwell or carry on his business there when the action was commenced. Again, the affidavit merely negatives the fact that either plaintiff or defendant " is an officer of the Westminster County Court," and not that either of them was an officer of that Court when the action was brought. Further, it does not state that neither the plaintiff nor the defendant were officers of any other County Court, which, it is submitted, it should have done; for the words, "County Court," are declared by the 142nd section to be "understood to mean any Court holden under this act." [Maule, J.—The affidavit states that all the medicines, with certain exceptions, were delivered at the Union Club, which is within the jurisdiction, "and is the place where, before and at the commencement of this suit, the defendant was and is employed, dwells and carries on his business." Must not the latter words be read as "dwelt and carried on his business?" No; the words seem to have been designedly confined to the present tense, for in the passage immediately preceding them, both the past and the present tenses are used; and if it was the fact that the defendant did not dwell and carry on his business at the place in question when the action was commenced, an indictment for perjury could not be sustained upon the affidavit, as it is now worded.

If these objections to the affidavit be not fatal to the present application, then the question for the decision of the Court is, what is the true construction of the second exception in the 128th section. [The argument on this point is omitted, as the Court gave no decision upon it.]

Joyce, in support of the rule. The defendant's affidavit is sufficient. It is now established that affidavits in support of such applications as the present are not to be construed as

strictly as pleadings, and that it is only necessary that they should make out a primâ facie case; Butler v. Corney (a); Hayter v. Fish (b). The affidavit does not, it is true, state with grammatical accuracy that the defendant dwelt within the jurisdiction at the time of the commencement of the action, but it is submitted that that must be inferred from the statement that he dwelt there at the time of swearing the affidavit; and if the fact be not true, the plaintiff will not be damnified, as he will be at liberty to traverse the suggestion. With respect to the objection that the third exception in the 128th section is not negatived, the language of the affidavit amounts to a denial that either plaintiff or defendant, or any other person interested in the result of the action, was an officer of the County Court where the action was brought. The argument on the construction of the second exception in the 128th section is omitted.]

WILDE, C. J.—This rule must be discharged. affidavit of the defendant is not sufficiently precise to sustain the application. It is true that a certain degree of laxity has in some cases been allowed; but the affidavit ought at least to be such as pledges the party making it to the truth, in some form or other, of the facts which must exist in order to entitle him to enter a suggestion. This affidavit fails in the two particulars pointed out in the argument. It does not shew that the defendant dwelt or carried on his business within the jurisdiction of the Westminster County Court of Middlesex at the time of the action brought; and it does not negative that the plaintiff and defendant were officers of the County Court at that time. The words of the affidavit refer only to the time when it was sworn; and the concluding passage, "nor was any officer of the said County Court a party, directly or indirectly, concerned in

vol., vi. o o b. & i.,

Doub v. Wigley.

⁽a) Ante, p. 45; S. C. 2 Exch. 474.

⁽b) Ante, vol. 6, p. 355; S. C. 6 C. B. 568.

Dodd v. Wigley. the matters in question in the cause," only apply to a person other than the plaintiff or defendant. The other question which has been discussed is one of importance, but it is, in consequence of the defects in the affidavit, unnecessary to decide it (a).

Cresswell, J. (b).—I am of the same opinion. question on the merits is one of much importance, and one which I should not be disposed to decide without further consideration. But the affidavit is insufficient, and the question, therefore, does not arise. It is said that the only fault it contains is bad grammar, and that the Court is to construe it so as to support it if possible. If its language was insensible, there might be something in the argument; but, taking the words in their ordinary signification, the grammar is very good. The present tense can only apply to the time of swearing the affidavit; but when the affidavit says that the defendant "was and is employed," and then goes on to say, "dwells and carries on his business," the latter words, clearly, cannot refer to the time of bringing the action, but only to that of swearing the affidavit. Hayter v. Fish (c) was a very different case. The other defect pointed out is equally fatal.

WILLIAMS, J.—I regret to have to decide this case on a bye-point; but the affidavit does not shew any title to the relief sought by the rule.

Rule discharged.

⁽a) See Wood v. Perry, ante, (c) Ante, vol. 6, p. 355; S. C. p. 194. (c) Ante, vol. 6, p. 355; S. C.

⁽b) Maule, J., had left the Court.

1849.

CLOSSMAN v. WHITE.

DETINUE. The declaration stated that the plaintiff, The allegation on, &c., delivered to the defendant certain goods and a declaration chattels, to wit, &c., of the plaintiff, of great value, &c., in detinue, is not traversable. to be re-delivered by the defendant to the plaintiff upon request. Averment of request, non delivery and detention.

The defendant, who was under terms of pleading issuably, applied to Williams, J., at Chambers, for leave to plead several matters, and among others a traverse of the bailment. The learned Judge refused to allow this plea; and a rule having been subsequently obtained for leave to plead it,

Byles, Serjt., shewed cause. He cited 1 Chit. Archb. 237, 8, 8th ed.; Gledstane v. Hewitt (a); Walker v. Jones (b); Clements v. Flight (c); Whitehead v. Harrison (d), and Mason v. Farnell (e).

Greenwood, in support of the rule, contended that it would be a great hardship to deprive the defendant of the liberty of pleading a traverse of an allegation, which, before the new rules, was in effect traversed by the plea of non detinet.

WILDE, C. J.—I think that this plea ought not to be allowed; and I do not see that the defendant is thereby placed in any difficulty. The proposed plea is against the current of all the authorities from Brooke's Abridgment down to the present time; and I do not think that the new rules require any alteration to be made on the subject. In detinue, the detainer is the gist of the action, and the allegation of the bailment is not material, in the sense of

⁽a) 1 C. & J. 565. (d) Ante, vol. 2, p. 122; S. C. 6 Q. B. 423. (b) 2 C. & M. 672.

⁽e) Ante, vol. 1, p. 576; S. C. (c) Ante, vol. 4, p. 261; S. C. 16 M. & W. 42. 12 M. & W. 674.

CLOSSMAN v. WHITE.

being traversable. The plaintiff may allege any bailment he pleases, be it true or fictitious: the defendant may plead anything which shews that the detention is lawful; and then the plaintiff may, by his replication, set up a special bailment in answer to the plea, in which case the bailment becomes material, because it is an answer to the plea. The defendant is not restrained from shewing that his detention of the goods is lawful; and, therefore, I do not feel the weight of the argument which is founded on the supposition that he is in some difficulty. If any authority could be shewn which could raise a doubt as to his being entitled to set up a title inconsistent with the plaintiff's, the matter would be worthy of consideration. But this principle of pleading has been much discussed in many cases; the whole subject was fully gone into in Gledstane v. Hewitt (a); and, as I think the defendant has shewn no ground for his application, the rule must be discharged with costs.

MAULE, J.—I am of the same opinion. This plea is not supported by any authority. The new rules have, it is true, made a difference in the subject, and the old authorities are no longer as applicable as they were. The result, however, of the whole matter seems to me to be, that the defendant is entitled to shew, in some form, that the goods are not the goods of the plaintiff, but that he must not do so in the form in which he now proposes to do it. The bailment in a declaration in detinue was certainly considered before the new rules not to be traversable; and there is nothing to shew that those rules have made it traversable. effect has been merely to confine the operation of the plea of non detinet, which, before the new rules, traversed, inter alia, the bailment. The defendant may, perhaps, avail himself of this defence in some other form. Upon the whole, although the matter is not quite so clear to me as it is to the Lord Chief Justice and the rest of the Court-I have

come to the conclusion that this plea cannot be pleaded, and that this rule, therefore, must be discharged.

CLOSSMAN

b.
White.

CRESSWELL, J.—I am also of opinion that this plea should not be allowed. I am not aware that the new rules have the effect of making pleas good which were bad before, though they undoubtedly make many pleas bad which, before, were good. In Brooke's Abr. tit. "Detinue de biens (a)," it is said, citing from the Year Books, that "did not bail" is no plea, for the bailment is not traversable; and if we were to allow the proposed plea, it would be in direct defiance of that authority. The subject was reviewed in Gledstane v. Hewitt (b). The plaintiff is not bound to prove the bailment as laid; but he must aver a bailment, and shew a foundation for his claim. If this plea were allowed, an issue would be raised which has never been raised from the time of Brooke to the present.

WILLIAMS, J.—I am of the same opinion. It was well established before the new rules, that this plea could not be pleaded in detinue; and I see nothing in the new rules to make the bailment a material and traversable allegation. Whitehead v. Harrison (c), and Mason v. Farnell (d), are express authorities upon the point.

Rule discharged.

(a) Pl. 50. "Detinue. n'est plea que ne bailla pas, car le bailement n'est traversable, car il repondra al detinue, 3 H. 4." Translated Vin. Abr. tit. "Detinue," (D 5), pl. 8.

- (b) 1 C. & J. 565.
- (c) Ante, vol. 2, p. 122; S. C. 6 Q. B. 423.
- (d) Ante, vol. 1, p. 576; S. C. 12 M. & W. 674.

1849.

An attachment will not be granted against an attorney for disobedience to a rule of Court, ordering him to deliver his bill of costs within a time named, unless a demand be first made of him for his bill by one of the persons to whom he is by the rule ordered to deliver it.

In re CATTLIN.

THIS was a rule for an attachment against an attorney for disobedience to a rule of Court, requiring him to deliver his bill of costs. It appeared from the affidavits in support of the rule, that a Judge's order was obtained and served on the 10th of January, on behalf of Mrs. Briggs, requiring Cattlin, her late attorney to deliver, within ten days, his bill of costs against her to Messrs. B. & D., her present attorneys. Cattlin disobeyed the order, and it was made a rule of Court on the 22nd of January. The rule was served on the following day on Cattlin, by a clerk of Messrs. B. & D., who at the same time demanded the bill of costs; and that demand not having been complied with, the present rule for an attachment was obtained.

Dearsley shewed cause. The demand ought to have been made by one of the persons named in the rule, or at least by some person duly authorized by them to make it. It does not appear that the clerk had any such authority.

J. Brown, in support of the rule. This is not like the case of a demand of money where the party paying it has a right to require a valid discharge for it at the time he pays: in that case, it is admitted, either a person named in the rule, or one legally constituted the attorney of such person, for the purpose of receiving and giving a discharge for the money, must make the demand. But this is merely a demand for a bill of costs for which no receipt was necessary. But further, it was not necessary that any demand should be made. It was the duty of Cattlin, in obedience to the Judge's order, to deliver the bill within a given time; which time has elapsed.

WILDE, C. J.—Is there any case which shews that where a demand is necessary, that demand may be made by a

person not named in the rule? I think there has been no such demand in this case as is necessary to support a rule for an attachment.

1849. In re CATTLIN

PER CURIAM.

Rule discharged.

MORRISON v. CHADWICK.

A SSUMPSIT. The first count of the declaration stated, To a plea of set-off, allegthat on, &c., in consideration that the defendant had become, and then was, tenant to the plaintiff of divers messuages, lands, and premises, the defendant promised the plaintiff to use the same in a tenant-like and proper manner, during the continuance of the said tenancy. Breach, that although the said tenancy did continue for a long space of time, to wit, from the day and year last aforesaid hitherto, the defendant, not regarding his said promise, did not, during the continuance of the said tenancy, use the said messuages, &c., in a tenant-like and proper manner; but on the con- tion of lessee trary thereof, the defendant, during the continuance of the said tenancy, to wit, on, &c., and on divers other days, &c., so improperly conducted himself in that behalf, and used eviction; but the said messuages and chattels therein in so untenant-like not thereby and improper a manner, that by reason thereof the said from the ob messuages, &c., became and were ruinous, &c.

There were also counts for use and occupation, money paid, and upon an account stated.

Second plea to the first count, that the plaintiff, during the continuance of the said tenancy, and before any breach of the defendant's alleged promise, to wit, on, &c., with tion by lessor

ing that the plaintiff, "be-fore and at the time of the commence ment of the suit, was and is indebted: a replication. that the plaintiff "was not indebted modo et formâ," is good.

Partial evicby lessor suspends the entire rent during the the tenant is discharged servance of any of the covenants, except the covenant for the payment

Therefore, to a declaraagainst lessee. for breach of

his promise to use the demised premises in a tenant-like manner, a plea of partial eviction is no

A plea, to such a declaration, of a surrender by operation of law, to wit, by defendant quitting the premises with the intention of determining the tenancy, and plaintiff accepting them with that intention, is bad; for, semble, it does not show a surrender by operation of law; but if it does, it is an argumentative denial of any breach during the tenancy.

MORRISON

CHADWICK.

force and arms, and without the consent, and against the will, of the defendant, entered into and upon, a certain part of the said demised premises, to wit, a shed; and then ejected, expelled, and put out the defendant from the possession thereof, whereupon the defendant; before any breach of the said promise, and whilst he was so ejected, &c., from the said part of the said demised premises by the plaintiff as aforesaid, to wit, on, &c., wholly quitted, abandoned, and gave up to the plaintiff the residue of the said demised premises, and the possession thereof, and the plaintiff has had the same, and the possession thereof, from thence hitherto. Verification.

Third plea to the same count, that during the said tenancy, and before any breach, &c., to wit, on, &c., the said messuages, &c., and the said estate, term, and interest of the defendant therein, were duly surrendered to the plaintiff by act and operation of law, that is to say, by the defendant then quitting the said messuages, &c., and every part thereof, with the licence and consent of the plaintiff, and relinquishing the possession and enjoyment thereof to the plaintiff, with the intention of putting an end to the same tenancy, and by the plaintiff then accepting such possession and enjoyment, with the intention of putting an end to the same tenancy. Verification.

Fifth plea to the money counts: that the plaintiff, before and at the commencement of this suit, was, and still is, indebted to the defendant, &c.

Special demurrer by the plaintiff to the second and third pleas, on the ground, among others, that they were argumentative traverses of allegations in the declaration.

Replication to the fifth plea: that the plaintiff was not indebted to the defendant in manner and form, &c., concluding to the country.

Special demurrer to the replication to the fifth plea, on the ground that it neither traversed nor confessed and avoided the fifth plea, and that it was ambiguous.

Joinders in demurrer.

1849.

MORRISON

CHADWICK.

T. Jones, for the plaintiff. The second plea is an argumentative traverse of the breach in the declaration, and is The declaration complains that the defendtherefore bad. ant has used the demised premises in an untenant-like manner; and the plea, in setting up the alleged eviction and abandonment, argumentatively denies the existence of the tenancy, and consequently also that contract arising out of the tenancy, which is alleged in the declaration to have been broken. [Williams, J.—How does it appear from the plea that the tenancy is at an end? If the plea does not shew that, it affords no answer to the declaration. [Williams, J .- It was held in Newton v. Allin (a), that eviction from part of the demised premises is not an answer to an action for a breach of covenant to repair.] Even if it were, and this plea were good in substance, it is, nevertheless, open to the objection that it is an argumentative traverse. And the third plea is open to the same objection: it alleges that there was a surrender by operation of law of the premises before the alleged breach, which also is a denial of the tenancy, and of the contract arising out of it, in respect of which the action is brought. The third plea, further, does not shew a surrender by operation of It states that the defendant quitted the premises with the consent of the plaintiff, and with the intention of putting an end to the tenancy; and although that is alleged by the plea to be a surrender by operation of law, yet it is not so, Lyon v. Reed (b), but a surrender by the act of the parties, and should, therefore, have been averred to have been, in writing. [Maule, J., referred to Dodd v. Acklom(c)].

With respect to the demurrer to the replication to the fifth plea, it is objected that the replication denies only that the defendant "was," and not also that he "is" in-But it is to be observed that the replication is debted.

⁽a) 1 Q. B. 518.

⁽b) 13 M. & W. 285.

⁽c) 6 M. & G. 672.

MORRISON

CHADWICK.

pleaded to a plea of set-off, which alleges that the plaintiff, at the commencement of the suit, "was, and still is" indebted to the defendant; and in alleging, in answer to it, that the plaintiff "was" not indebted, the replication must be taken to refer to the time when the contrary was asserted, viz., to the time of pleading the plea. [Maule, J.—If the replication had traversed that the plaintiff "is" indebted, it would have traversed something not alleged in the plea; and if it were, nevertheless, necessary that it should do so, it might be just as necessary to deny that the plaintiff will be indebted at the time of the surrebutter.] The word "is," in the plea, refers to the time of pleading the plea; the word "was," in the replication, refers to the same time, and the replication is therefore a direct traverse of the allegation in the plea.

Peacock, contrà. The second and third pleas are not argumentative traverses. The contract stated in the declaration is one implied by law from the existence of a tenancy, viz., that the tenant will use the premises in a tenant-like manner; and the pleas, in answer to the charge that the defendant broke that contract, do not deny the legal existence of the tenancy out of which it arises, but allege facts which shew that the plaintiff has, by his own conduct, released the defendant from the performance of it. [Smith v. Ruleigh (a), Stokes v. Cooper (b), and Newton v. Allin (c), were referred to. Upon the question as to the surrender by operation of law, set up in the third plea, Grimman v. Legge (d) was cited.]

The replication to the fifth plea is bad. If the plea of set-off, to which it is pleaded, had omitted the averment that the plaintiff "still is" indebted, it would have been bad; Dendy v. Powell (e). The replication should have traversed the precise terms of the plea, and have denied that the

⁽a) 3 Camp. 513.

⁽b) Id. 514, n.

⁽c) 1 Q. B. 518.

⁽d) 8 B. & C. 324.

⁽e) 6 Dowl. 577; S. C. 3 M.

[&]amp; W. 442.

plaintiff "still is" indebted to the defendant. The replication does not deny simply that the plaintiff "was" indebted, but that he was indebted modo et formâ, that is in the sense in which it is said in the plea that he "was" indebted. The word "was," therefore, is not used in the replication as referring to the time of pleading the plea, but to the time referred to in the plea by that word. The replication, therefore, in omitting to traverse that the plaintiff "still is" -that is, "still is at the time of plea pleaded"-indebted, has admitted that the plaintiff "is" indebted, and consequently is no answer to the plea. In Faithfull v. Ashley (a), the defendant pleaded that he never was indebted to a greater amount than 4L, which he paid into Court, and the plaintiff having replied that the defendant "was" indebted ultrà, the replication was held bad. the present replication be good, then the ordinary form is demurrable.

Morrison

b.

Chadwick.

T. Jones, in reply. The second plea may afford a good answer in substance to the declaration, but if so, it amounts to a traverse of the tenancy; and the traverse, being argumentative, is bad. The objection to the third plea has not been answered. If the replication to the fifth plea had merely alleged that the plaintiff " is not indebted," no issue would have been raised, unless the word " is" was to receive the meaning of the word which has been actually employed, viz., " was."

Cur. adv. vult.

COLTMAN, J.—This was an action by a landlord against his tenant, founded upon the latter's promise to use the demised premises, during the continuance of the tenancy, in a tenant-like manner. The breach alleged is, that during the continuance of the tenancy the premises had been used by the defendant in an untenant-like manner,

(a) 1 Q. B. 183; S. C. 4 P. & D. 524; 9 Dowl. 555. See Fisher v. Ford, 12 A. & E. 654.

MORRISON v. Chadwick.

and became ruinous, &c. There was also a count for use and occupation, and several money counts.

To the first count in the declaration the defendant pleaded, secondly, that the plaintiff, during the continuance of the tenancy, and before any breach, entered into a certain part of the demised premises, to wit, a shed, and ejected, expelled, and put out the defendant from the possession thereof; and thereupon the defendant, before any breach, and whilst so expelled, wholly quitted, abandoned, and gave up to the plaintiff the residue of the demised premises, and the possession thereof; and that the plaintiff has had the same, and possession thereof, from thence hitherto. To this plea the plaintiff demurred, insisting that it amounted only to an argumentative denial of the allegation that the breach was committed during the continuance of the tenancy. For the defendant it was said, that the plea was a good plea in confession and avoidance; for that when the plaintiff entered upon a part of the premises, and evicted and expelled the tenant therefrom, the tenant was justified in relinquishing the possession of the remainder, and was no longer bound to perform the agreement he had entered But we are of opinion that this proposition cannot be supported. An eviction by a landlord of a tenant from part of the demised premises creates a suspension of the entire rent during the continuance of the eviction, until the tenant re-enters and resumes possession. (See the authorities cited in 1 Wm. Saund. 204, n. 2). But there are no authorities for holding that the tenancy is thereby put an end to, or that the tenant is discharged from the performance of the covenants other than the covenant for payment of rent. It may be urged that the landlord may have evicted the tenant from the possession of a part of the demised premises, the possession of which was the main inducement to him to enter into the covenants of the lease, and therefore that he ought not any longer to be bound by them; but it is to be borne in mind, that, in addition to the suspension of the rent, the lessee may maintain his

action against the lessor for the eviction, by which, it is to be presumed, that he will obtain satisfaction for any inconvenience or loss which he may suffer. If the eviction from a part by the landlord will not discharge the tenant from the performance of the covenants of his lease, other than the covenant to pay rent, will the relinquishing the possession of the land, and the landlord taking possession, have that effect? We think it will not; for the allegations do not shew a dissolution of the tenancy by mutual consent. The tenancy, therefore, continues; and whilst the tenancy continues, the obligation to perform the covenants continues. We think, therefore, the plea is bad.

The third plea alleges a surrender of the tenancy, before any breach, by operation of law, by the defendant quitting possession of the lands demised with the consent of the plaintiff, with the intention of putting an end to the tenancy, and by the plaintiff accepting such possession with the intention of putting an end to the tenancy. It was contended, on the part of the plaintiff, that this plea was bad, on the ground that the agreement stated in the plea would not constitute a surrender by act and operation of law, and that the plea furnished no answer to the declaration, unless it shewed a surrender; and we agree that this is so, for the breach is admitted, and, if the tenancy continued, no answer is given If, however, it ought to be held, agreeably to what is said in the case of Grimman v. Legge (a), that the plea shews a surrender by act and operation of law, we think the plea is bad on special demurrer, as amounting only to an argumentative denial that there was any breach during the tenancy.

The fifth plea is a plea of set-off, and states, in the usual form, that the plaintiff, before and at the time of the commencement of the suit, was, and still is, indebted to the defendant in a large sum of money, &c. To this plea the plaintiff, in his replication, says, that he was not indebted to the defendant, in manner and form as in the defendant's

MORRISON b. CHADWICK.

MORRISON D. CHADWICK.

last plea is alleged. To this replication the defendant demurred, on the ground that it ought to have alleged that the plaintiff "was not, nor is," indebted to the defendant. The replication in this case deviates from the usual form of pleading, but it appears to us to be grammatically correct, and that the allegation that he "was not indebted" in manner and form, amounted to a direct traverse of the matter alleged in the plea, and sufficiently answers what is alleged. The plaintiff, therefore, is, we think, entitled to judgment.

Judgment for the Plaintiff.

JONES v. BOXER.

An appearance entered after a distringas, and while the writ of summons is still in force. is an appearance to the writ of summons. It is, therefore, not necessary, in order to prevent the operation of the Statute of Limitations that the writ of summons should, after an appearance entered by the defendant subsequently to the issuing of a distringas. be served on the defendant in person, or returned non est inventus. or entered of record in compliance with the provisions of the

N this case the writ of summons was issued on the 8th of August, 1848, within a short time of the Statute of Limitations being a bar to the action. The plaintiff being unable to serve the defendant personally, obtained a distringas on the 1st of November, 1848, at which time, however, the statute had run. The defendant entered an appearance on the 25th of November, but the writ of summons was never served, nor was it returned non est inventus within a month after the 7th of December, the day on which it expired. The issue did not make any mention of the distringas, but stated that the action had been commenced by writ of summons on the 8th of August. The defendant took out a summons, calling on the plaintiff to shew cause before Coltman, J., at Chambers, why the issue delivered should not be set aside, or amended by inserting the date of the distringas as the date of the commencement of the action, instead of the date of the writ of summons, and why the entry of process on the roll should not be amended according to the truth, or set aside. The learned Judge declined to make the proposed order, but gave the defendant leave to apply to the Court.

10th section of the 2 Wm. 4, c. 39.

J. Brown now moved for a rule accordingly. The 10th section of the Uniformity of Process Act (2 Wm. 4, c. 39), after enacting that every writ of summons and capias may be continued by alias and pluries, if the defendant has not been served therewith, provides "that no first writ shall be available to prevent the operation of any statute" of limitations, "unless the defendant shall be arrested thereon, or served therewith, or proceedings to or towards outlawry shall be had thereupon, or unless such writ, and every writ (if any) issued in continuation of a preceding writ, shall be returned non est inventus, and entered of record within one calendar month next after the expiration thereof, including the day of such expiration." In this case the writ of summons was not served, nor was it returned non est inventus, or entered of record within a month of its expiration, in pursuance of the statute. The distringas must, therefore, be taken as the commencement of the action. In Pratt v. Hawkins (a), it was held that the writ with which the defendant is served is for the purposes of the 10th section, the commencement of the suit. A distringas may be issued in continuation of writs of summons, alias and pluries, previously issued; Ray v. Dow (b). As, therefore, the provisions of the 10th section have not been complied with, the plaintiff cannot avail himself of the writ of summons to defeat the Statute of Limitations.

MAULE, J.—In this case the action was commenced on a certain day, according to the Uniformity of Process Act, by a writ of summons. The 10th section of that act provides that no such writ shall be in force for more than four calendar months, but that it may be continued by alias and pluries writs; and then it provides that no first writ shall be available to prevent the operation of the Statute of Limitations, unless the defendant shall be served therewith, or unless it be returned non est inventus, and entered of

JONES

JONES

BOXER

JONES

P.

BOXEB.

record within a month of its expiration. The question here is, whether, the action having been commenced on a certain day by writ of summons, as truly stated in the issue, that issue should be amended by inserting the date of the distringas as the date of the commencement of the action. appears to me that the action was for all purposes commenced by the summons, and that the defendant has been served with it within the meaning of the 10th section of the The plaintiff is bound to use due diligence to serve the defendant personally within four months; but if he cannot succeed, he may come to the Court, and apply for a distringas, which will entitle him to enter an appearance, as if the defendant had been personally served. That appearance supposes that the action has been commenced by a writ of summons, the issuing of which is the foundation for the distringas. It is competent for a defendant to appear to a writ with which he has not been personally served. may treat it as if it had been served; or, on the other hand, the plaintiff may make it equivalent to a writ personally served, by obtaining a distringas. It would be a great anomaly and hardship if the plaintiff, after having done every thing which the 10th section requires to constitute good service, so as to save the Statute of Limitations, should be held to be barred, although he would not have been barred if the defendant had been actually served. The words of the 10th section referred to, viz., " Every writ (if any) issued, in continuation of a preceding writ, shall be returned, &c.," seem to me wholly inapplicable to a distringas. If not, it would be necessary, in getting a distringas, to sue it out within a calendar month from the expiration of the writ of summons, and to comply with the other requisitions of the 10th section, which would be a new practice.

Cresswell, J., and Williams, J., concurred.

Rule refused.

1849.

HOARE (a Pauper) v. DICKSON.

SAME v. DICKINSON.

THE defendant, Dickson, was the secretary of a chari- The plaintiff, table association, called the Royal Naval Benevolent having been nonsuited upon Society, from which the plaintiff, the daughter of a de-the merits in ceased naval officer, on several occasions, between the years slander, in 1838 and 1844, obtained pecuniary relief. In the latter fendant had year, the society refused her their aid, on the ground of pleaded a justification, Upon her renewing commenced, without having rumours affecting her character. her application, in the following year, a committee was paid the deappointed, of which the defendant Dickinson was the a second action chairman, for the purpose of investigating the imputations in forma panmade against her. In the prosecution of this investigation, stantially the Dickson, in the discharge of his duty as secretary, instituted as that declared inquiries respecting the character of the plaintiff, and laid upon in the first action, and the result before the committee, which reported, in 1846, also for other slanderous that the plaintiff was not a fit object for relief from the words spoken funds of the society. She, thereupon, brought two actions occasion as of slander in the Queen's Bench; one against Dickson, and the other against Dickinson. The defendants pleaded stayed the propleas of justification, and the causes were entered for trial second action before Parke, B., at the Croydon Summer Assizes, 1847. until payment of the costs of The jury having, after the plaintiff's case in Hoare v. the first. Dickson, had proceeded to some length, expressed their stay of prointention to find for the defendant, the plaintiff elected to granted where be nonsuited, and at the same time withdrew the record the plaintiff had withdrawn in the cause of Hoare v. Dickinson. Judgment was signed the record in in the first cause in the month of January, 1848, and the and the dedefendant's costs taxed at 408l. 10s. The defendant, obtained judg-Dickinson, subsequently obtained a rule absolute for judg- ment as in case of a nonsuit. ment as in case of a nonsuit, and the defendant's costs in that action were taxed at the sum of 2061. 10s. of these sums were paid by the plaintiff. On the 12th of

an action of fendant's costs. peris, for subsame slander on the same that slander.

The Court ceedings in the until payment the first action. fendant had

VOL. VI.

D. & L.

HOARE v. DICKSON.

January, 1848, she commenced two fresh actions in this Court; one against Dickson, and the other against Dickinson; and on the 11th of January, 1849, delivered declarations, each containing ten counts. The plaintiff sued in formâ pauperis.

Upon a former day in this Term, Shee, Serit., obtained rules in each of the actions in this Court, calling upon the plaintiff to shew cause why all further proceedings should not be stayed until the defendant's costs in the former action, between the same parties, in the Queen's Bench, should have been paid. The affidavits upon which he moved, after setting forth the above facts, stated the defendant's belief that the action was brought solely to harass the defendant and the Royal Naval Benevolent Society, and that the plaintiff had no merits; and also stated that the alleged causes of action in the second action accrued to the plaintiff before the commencement of the first action, and that the causes of action in five of the counts of the declaration in the second action were the same as those for which the first action was brought. A copy of the pleadings in the former actions were annexed to the affidavits.

Carter shewed cause. Five of the ten counts are admitted to be for causes of action not comprised in the first action; as to them, therefore, there is no ground for staying proceedings, for the Court will not interfere, unless the causes of action in both actions are identical. [Dioas v. Jay (a); Wade v. Simeon(b); Liversedge v. Goode (c); Haigh v. Paris(d); Doe d. Rees v. Thomas(e); 2 Chit. Archb. 1203, were referred to.] The defendants have not been damnified, for it appears from the affidavit of the plaintiff that their costs have been paid by the Royal Naval Benevolent Society.

⁽a) 6 Bing. 519; S. C. 4 M. & P. 285.

⁽b) 1 C. B. 610; S. C. ante, vol. 3, p. 27.

⁽c) 2 Dowl. 141.

⁽d) 16 M, & W. 144; S. C. ante, vol. 4, p. 325.

⁽e) 2 B. & C. 622; S. C. 4 D. & R. 145.

Shee, Serjt., and Lush, in support of the rules, were stopped by the Court.

HOARE v. Dickson.

WILDE, C. J.—The principle upon which this application must be decided is the well-known one, that if a person who has brought an action, and has had an opportunity of trying it on the merits, fails upon the merits, or withdraws the record, and afterwards brings a second action for, substantially, the same cause, without having paid the costs of the first action, the Court will interfere and stay the proceedings in the second action until those costs are paid. And most unquestionably will the Court interfere if it appears that the plaintiff's conduct is vexatious, and intended to harass and annoy the defendant. the present case appear to be these: the defendant Dickson was the secretary of the Royal Naval Benevolent Society, and the plaintiff was an applicant for relief to the society, as a person coming within the general objects of the institution. Under these circumstances, it became the duty of the secretary to make inquiries into her character and claims. He made those inquiries, and laid the result of them before those who had the administration of the funds of the society in their hands. The matters for which these actions were brought arose out of the communications which he so made, in the discharge of his duty as secretary, to the managers of the institution; and an action having been accordingly brought against him, it proceeded to trial, when, after the plaintiff's case had been heard at some length, her counsel elected to be nonsuited, not upon any technical ground, not on the ground of surprise, but upon the merits, and from a consciousness that the plaintiff's case was such that the jury would not find a verdict in her favour. In defending that action, Dickson was put to the heavy expense of 408L 10s. Those costs have never been paid by the plaintiff; but she, nevertheless, brings a second action, and the question is, whether it is not brought for substantially the same cause as the first, and brought for the

HOARE
DICKSON.

purpose of vexing and harassing the defendant. that because some of the counts introduce new matter, the declaration shews a new cause of action. It is very easy, in cases of slander, to introduce colourable differences in different declarations; but whether there be any real difference in the subject-matters of complaint is to be ascertained by a consideration of all the facts. The affidavits here state that all the alleged new slanders were uttered before the commencement of the first action; and if the plaintiff really sustained any injury from those slanders, and they gave her any real cause of action, why were they omitted from the first declaration, and why is no explanation given of that omission? Suppose a person brought an action of trover for a suit of clothes, in which action the defendant obtained a verdict upon the merits, and that the plaintiff afterwards brought a second action for the same clothes, and also for a pocket handkerchief, which happened to be in the pocket of the coat, but was not specifically named in the first declaration, could it be doubted that the second action was for substantially the same cause as the first? There would be a difference in the declarations, certainly, but that difference would be merely colourable. In the same way it appears to me that this second action is brought for substantially the same cause as the first, and that it would be unjust that this defendant, who has already been put to an expense of 400L, and upwards, should be subjected to a second action for the same cause, especially where the plaintiff incurs no risk or expense, as she sues in formâ pauperis. Besides, the action is brought vexationsly, for the slander now complained of for the first time might, and ought to have been included in the former declaration. It is said that the costs have been paid; but there is no pretence for saying that they have been paid for or on behalf of the plaintiff. It does not follow that because the Royal Naval Benevolent Society have satisfied the costs incurred by their officer, the plaintiff does not continue liable to him for them.

There is no substantial difference between the case of Dickinson and that of Dickson. In Hoare v. Dickinson. the defendant was a member of the society, and acted bonâ fide in the performance of the duties properly assigned to The performance of those duties was the foundation of the former action, in which the plaintiff, after entering it for trial, withdrew the record, and has not yet paid the I, therefore, think that the rules in both cases must be made absolute.

1849. HOARE DICKSON.

MAULE, J., CRESSWELL, J., and WILLIAMS, J., concurred.

Rule absolute.

EDMONDS v. CHALLIS and Another.

CASE against the sheriff of Middlesex, for taking an The effect of insufficient replevin bond.

The declaration stated that the plaintiff, after the 14th of March, A.D. 1847, to wit, on the 29th of March, 1847, stitute a proand within the jurisdiction of the Whitechapel County Court of Middlesex, in certain premises situate in the trict County county of Middlesex, and within the jurisdiction of the Courts, in lieu of the old pro-Whitechapel County Court of Middlesex, by one George ceeding in the Ellis, his bailiff in that behalf, lawfully took and distrained

the 119th section of the County Courts' Act is to subceeding in replevin suits in the new dis-County Court.
Although,

since the es tablishment of

the district Courts, the jurisdiction to hear and determine replevin suits has been taken away from the sheriff and conferred upon those Courts, it is still his duty to make replevins, and to take bonds under the 11 Geo. 2, c. 19, s. 23, to prosecute the suit with effect and without delay.

A bond conditioned for appearing at the next County Court, and then and there prosecuting the suit with effect, is no longer a compliance with the provisions of the 11 Geo. 2, for that condition is now idle, if it requires a suit to be commenced in the County Court, and is insufficient if its effect be to require the suit to be prosecuted in the district Court, inasmuch as

The amount of rent for which the distress is made, plus the expenses of the distress, is a proper measure of damages in an action by the landlord against the sheriff for granting an

insufficient replevin bond.

The declaration in such an action alleged that the County Court had no jurisdiction at the time of taking the bond: Held, upon motion in arrest of judgment, that it sufficiently appeared upon the declaration that the County Court had no jurisdiction at the time of making the plaint to the sheriff.

Where a party refuses to produce a deed at the trial, and a copy is duly proved, he cannot afterwards exclude it by producing the original, and requiring it to be proved by the attesting EDMONDS

CHALLIS
and Another.

divers goods and chattels, to wit, &c., then being in and upon the said premises, and of great value, to wit, of the value of 47L 4s., as a distress for certain arrears of rent, to wit, for the sum of 35L, of lawful money, then due and owing from, to wit, one H. Rowe, to the plaintiff, for the rent of the said premises, by virtue of a certain demise, &c. That the plaintiff, by the said G. E., detained the said goods and chattels until the defendants, then being sheriff of the said county, afterwards, to wit, &c., on the complaint of one Kitty Gladman, caused the said goods and chattels to be replevied and delivered to the said K. G., and then made deliverance of the said distress to the said K. G. That although it was the duty of the now defendants, as such sheriff, before their making deliverance of the said distress to the said K. G. as aforesaid, in pursuance of the statute, to take from the said K. G., and two responsible persons as sureties, a bond in double the value of the said goods and chattels so distrained as aforesaid, conditioned for the prosecuting the suit of replevin with effect and without delay, and for duly returning the goods in case a return should be awarded, as the defendants then well knew; nevertheless, the now defendants, so being such sheriff, not regarding their duty, &c., did not, before their making deliverance of the said distress, take such a bond as aforesaid, conditioned as aforesaid, or any bond except the bond hereafter mentioned, but wrongfully and injuriously omitted so to do; and then after the said 14th of March, to wit, on, &c., only took from the said K. G., and A. M. and R. K. being two responsible persons as sureties, a bond in double the value, &c., conditioned for the said K. G.'s appearing at the then next County Court for the county of Middlesex, to be holden at the house known by the name of the Sheriffs' Office, in Red Lion Square, in the said county, and for the said K. G., then and there, that is to say, in the said last-mentioned County Court of Middlesex, prosecuting her, the said K. G.'s, action with effect, against the said G. E., for taking and unjustly detaining the said goods and chattels, and for the said K. G.'s making return thereof, if return

should be adjudged by law, and for the said K. G.'s well and truly keeping harmless and indemnified the said sheriff, &c., which said County Court mentioned in the said condition as aforesaid, had not at the time of the taking of the said bond, any jurisdiction to hear or determine any action of replevin for the taking and detaining the said goods and chattels, or any or either of them; and the Whitechapel County Court of Middlesex was, at the time of the taking of the said bond, the only Court in which the said K. G. could validly commence an action of replevin for taking and detaining the said goods and chattels, by means of which said premises the plaintiff was wholly deprived of the said goods and chattels, and of the benefit of the said distress, and of the means of satisfying the said arrears of rent, and the costs and charges of the said distress, amounting to a large sum, to wit, 101; and at the commencement of this suit was likely to lose the said arrears and costs and charges of the said distress. And in consequence of the premises, and although a reasonable time for the said K. G. commencing, in the Whitechapel County Court of Middlesex, an action of replevin for the taking and detaining the said goods and chattels elapsed after the repleying of the same as aforesaid, and before the commencement of this suit; yet the said K. G. did not within such reasonable time commence in the last mentioned Court such action as aforesaid; yet the plaintiff lost the benefit of such bond as the defendants ought to have taken and omitted to take as aforesaid, and was put to great costs, charges and expenses, amounting to, &c., in and about ascertaining what bond the defendants had taken, and about inquiring into the sufficiency of the said bond, and the power of them, the defendants, to assign the same to the plaintiff, to the damage, &c.

Pleas: first, not guilty; secondly, that the said County Court mentioned in the said condition as aforesaid, had at the time of the taking of the said bond jurisdiction to hear and determine any action of replevin for the taking and detaining the said goods and chattels, &c. Issues thereon.

EDMONDS

T.

CHALLIS
and Another.

EDMONDS
v.
CHALLIS
and Another.

Upon the trial before Cresnoell, J., at the first Middlesex sittings in Michaelmas Term, 1847, it appeared that the plaintiff, the owner of certain premises in Assembly Row, Mile End Old Town, on the 29th of March, 1847, made a distress upon them, by George Ellis his bailiff, for arrears of rent due to him by Henry Rowe, the occupying tenant; and that the goods then seized were, on the 1st of April, delivered by the sheriff to one Kitty Gladman, who claimed them as her own property, upon her executing the replevin bond mentioned in the declaration, for 94%. 8s., double the value of the goods. It was further proved that the premises upon which the distress was made were within the jurisdiction of the Whitechapel County Court of Middlesex, and that that Court was duly constituted by an order in council under the County Courts' Act, on the 15th of March, 1847, and had been opened for business on the 22nd of the same month. In the course of the trial, the plaintiff's counsel called for the bond, which the defendants had had notice to produce, and upon their refusal to produce it, proved a copy which had been procured at the sheriff's office, and handed it in. The counsel for the defence thereupon, and just as the officer of the Court was about to read the copy, produced the original, but objected to its reception until the execution of it should have been proved by the attesting witness. The learned Judge overruled the objection; but the original, and not the copy, was read. The condition of the bond was as follows:—"The condition of the said obligation is such, that if the above bounden K. G. do appear at the next County Court for the county of Middlesex, to be holden at the house known by the name of the Sheriff's Office, in Red Lion Square, in the said county, and shall then and there prosecute her action with effect against G. E., for taking and unjustly detaining her goods and chattels, to wit," &c., "and make return thereof, if return shall be adjudged by law, and shall well and truly keep harmless and indemnified the said sheriff of Middlesex, his undersheriff, deputies and bailiffs, touching and concerning the replevying and delivery of the said goods and chattels, then the said obligation to be void and of no effect; otherwise to be and remain in full force." The defendants' counsel objected that there was no evidence to go to the jury of any damages sustained by the plaintiff, but the learned Judge left the question to the jury, who found a verdict for the plaintiff, damages 35l. for the rent due, and 2l. 16s. for the expenses of the distress. Leave was reserved to move to enter the verdict for the defendants, if the Court should be of opinion that the bond was sufficient.

EDMONDS
9.
CHALLIS
and Another.

Bramwell, in the same Term, obtained a rule accordingly, and also for a new trial, on the grounds that the bond had been admitted without having been proved by the attesting witness, and that the plaintiff was not entitled to recover the rent and expenses as damages; and also to arrest the judgment, on the ground that the declaration did not shew that the County Court had no jurisdiction at the time when the replevin suit was commenced.

Baines and Massey Dawson shewed cause. The only remedy at common law for the recovery of goods taken under a distress, was a writ of replevin issuing out of Chancery, and directed to the sheriff, whereby he was directed to deliver up the goods, and see that justice was done. But this process was found tedious and inconvenient, especially in distant parts of the kingdom, and the Statute of Marlbridge (52 Hen. 3, c. 21) was therefore passed, which empowered the sheriff, upon complaint made to him, to deliver up to the owner the beasts taken and wrongfully withholden from him. This replevy could take place out of Court, as appears from the 1 & 2 P. and M., c. 12, s. 3, which directs the sheriff to appoint four deputies to take replevies; so that the replevin was not the act of the County Court. The Statute of Westminster 2 (13 Edw. 1, stat. 1, c. 2), required the sheriff to take pledges not only

EDMONDS

CHALLIS
and Another.

to prosecute the suit, but also to return the distress if a return should be awarded. As, however, this duty was often neglected, the 11 Geo. 2, c. 19, was passed, and by sect. 23 it was enacted, that "to prevent vexatious replevins of distress taken for rent, all sheriffs and other officers having authority to grant replevins," should "in every replevin of a distress for rent, take in their own names, from the plaintiff and two responsible persons as sureties, a bond in double the value of the goods distrained and conditioned for prosecuting the suit with effect and without delay, and for duly returning the goods and chattels distrained, in case a return should be awarded, before any deliverance" were made of the distress. This bond was, by the same act, made assignable at law to the person making avowry or cogni-After its execution, the plaintiff levied a plaint in the County Court. This was the state of the law when the County Courts' Act (9 & 10 Vict. c. 95) passed. The 119th section of that statute enacts, "that all actions of replevin in cases of distress for rent in arrear or damage faisant, which shall be brought in the County Court, shall be brought without writ in Courts held under this act:" and the 120th enacts, "that in every such action of replevin, the plaint shall be entered in the Court holden under this act for the district wherein the distress was made." The whole replevin suit, therefore, is to be prosecuted in the new County Courts, and three of the rules (the 24th, 25th, and 26th) settled by the Judges for regulating the procedure of those Courts, are directed to the proceedings in replevin. The County Courts' Act, however, has not exonerated the sheriff from the duty of taking a replevin bond under the act of 11 Geo. 2, c. 19; and if the bond which was taken in the present case had been in compliance with the provisions of that act, no difficulty would have arisen.

It will be contended, on behalf of the defendants, that the bond was sufficient; or that if it is not, it is because the County Courts' Act has taken away the jurisdiction of

the sheriff to grant replevins. First, the bond is not sufficient. The condition of it is, that the party replevying shall appear "at the next County Court for the county of Middlesex," to be holden at the Sheriff's Office, and "shall then and there prosecute her action with effect." Since the passing of the 9 & 10 Vict. c. 95, the old County Court has no jurisdiction to hear and determine replevin suits, and as there are no less than eleven new district Courts in the county of Middlesex, the bond, in requiring an appearance at the next County Court, and a prosecution of the suit "then and there," requires that to be done which is manifestly impossible. Even before that act it was thought improper that the bond should require the suit to be prosecuted "then and there," that is, at the next County Court; Jackson v. Hanson (a); for the 11 Geo. 2, c. 19, s. 23, only requires that the bond shall be conditioned for prosecuting the suit "with effect and without delay." The bond, therefore, not following the provisions of the act, was not assignable, and was, therefore, no security to the plaintiff, although it might be binding as between the party replevying and the sheriff; Austen v. Howard (b); and although the words "then and there," notwithstanding their not being required by the act, might be binding on the obligor; Morris v. Matthews (c). The object of the act of 11 Geo. 2, c. 19, which was to enable the party to have a speedy remedy, (per Maule, J., in Thompson v. Farden (d),) is defeated by taking such a bond as this. Turner (e) was referred to.

That the old County Courts have now no jurisdiction over replevin suits is obvious, from a consideration of the 6th and 119th sections of the 9 & 10 Vict. c. 95. The former section enacts, that as soon as a district Court is established, the provisions of every act of Parliament giving

EDMONDS

CHALLIS
and Another.

⁽a) 8 M. & W. 477; S. C. 1 & D. 677.

Dowl. N. S. 69.
(b) 7 Taunt. 327; S. C. 1 Moore,
(c) 2 Q. B. 293; S. C. 1 G.

& D. 677.
(d) 1 M. & Gr. 537; S. C. 8

Dowl. 813; 1 Scott, N. R. 275.
(e) 2 B. & B. 107; S. C. 4 Moore,
606.

EDMONDS

CHALLIS
and Another.

jurisdiction to any Court shall be repealed. The jurisdiction to hear plaints in replevin was conferred upon the sheriff, not by the common law, but by the Statute of Marlbridge, and, consequently, falls within the 6th section. It may be said, that if the sheriff has still power to grant and to take replevin bonds, his jurisdiction over plaints in replevin must also continue (preserved by the 4th section of the 9 & 10 Vict.), because by the Statute of Marlbridge he is empowered to grant replevin only "after complaint made to him thereof;" that is, it will be said, after a "plaint" has been entered in his Court. But the fallacy of this argument lies in confounding the word "complaint" or "querimonia," as it is in the original Latin, with the technical term "plaint" or "querela." The "querimonia" mentioned in the Statute of Marlbridge is the application, which may be made in pais, (2 Inst. 139), to the sheriff, or to his deputies under the Statute of Ph. & M., to replevy. The Statutes of Westminster 2 and of Geo. 2 require him to take a bond previously to his delivering up the goods, but at the time when it is taken, there is no cause in Court; Tesseyman v. Gildart (a). It is only after the execution of that bond, that the "plaint" or "querela" is commenced. That the plaint must now be entered in the district Court is clear from the 120th section of the County Courts Act; and it is the duty of the plaintiff, not of the sheriff, to do that; Ex parte Boyle (b). There is nothing, however, in the act which affects the sheriff's power of granting replevins and taking replevin bonds; indeed that power is vested in no other person, and it therefore seems that the duties of the sheriff continue as they were before the act, except that inasmuch as the plaintiff must enter his plaint in the district Court, the bond ought to be conditioned to do so, and no longer to enter it in the old County Court.

With respect to the admission of the bond, without calling the attesting witness, it is sufficient to say that the plaintiff having called for, and been refused, the original, had a right to have the copy, which he had proved, read; and the circumstance that the original, and not the copy, was in fact read, is immaterial. Jackson v. Allen (a) is precisely in point. The only other question is, whether there was and Another. evidence to warrant the jury in finding more than nominal [Upon this point, 1 Wms. Saund. 195 i, n. (p), 6th ed.; Evans v. Brander (b); Perreau v. Bevan (c); Wylie v. Birch (d); Bales v. Wingfield (e); Clifton v. Hooper (f), were cited.

1848. EDMONDS e. Challis

Bramwell and Burchell, in support of the rule. Statute of Marlbridge substituted a complaint to the sheriff in the place of the old writ of replevin issuing out of Chancery; and that "complaint" or "querimonia" has been treated by the most eminent writers as the commencement of the suit; 2 Inst. 139; Dalton on Sheriffs, 435; Gilb. Distr. 4th ed. 85. [Maule, J.-Mr. Udall, in a note to the 119th section of his edition of the County Courts' Act, cites Mr. Atkinson's Book on Sheriff Law, p. 80, as stating the better opinion to be, that no plaint is necessary before replevin.] In practice, a plaint is always entered before the declaration in replevin; Tidd's Forms, 660, 6th ed. The jurisdiction of the sheriff under the Statute of Marlbridge only arises "post querimoniam inde sibi factam," and unless the "querimonia" means "plaint," sheriffs have ever since that statute been trying replevin suits without jurisdiction. is true, the plaint may be made out of Court to the sheriff or his deputies; but it must be afterwards recorded in The act of 11 Geo. 2, requires the bond to be conditioned to prosecute "the suit," and not to commence and prosecute it; it assumes, therefore, that the suit has been commenced before the bond is executed. of Tesseyman v. Gildart (q) has been misunderstood; the

```
(a) 3 Stark. 74.
                                   & D. 629.
  (b) 2 H. Bl. 547.
                                     (e) 4 Q. B. 580, note.
  (c) 5 B. & C. 284; S. C. 8 D.
                                     (f) 6 Q. B. 468.
& R. 72.
                                     (g) 1 N. R. 292.
  (d) 4 Q. B. 566; S. C. 3 G.
```

EDMONDS

CHALLIS
and Another.

Court there refused a rule against the officer for the payment of costs for taking insufficient pledges de retorno habendo, not on the ground that there was no cause in the Court below, but because there was no cause in the Common Pleas where the motion was made. The only point decided in Ex parte Boyle (a) was, that the Court would not, on motion, compel the sheriff to enter a plaint, although they might perhaps have granted a mandamus for that purpose. It is submitted, therefore, that the jurisdiction of the sheriff is the same as before the statute; and that a plaint must be entered in his Court upon his repleying. The change which the County Courts' Act has made, has been to establish new Courts in somewhat the same position as the superior Courts, into which the proceedings in replevin were removed by recordari. The 24th rule, which directs that when goods are replevied by the sheriff, the claimant shall enter a plaint in the district Court, recognises the sheriff's power to replevy; but if the plaint in the district Court, and not a plaint, as heretofore, in the old County Court, is the commencement of the replevin suit, then the County Courts' Act has taken away the jurisdiction of the sheriff altogether in replevin, and he cannot take a bond at If that be so, the present action is not maintainable, for the sheriff has committed no breach of duty. If, on the other hand, the other branch of the argument be well founded, and the sheriff's jurisdiction remains unaffected by the recent act, then the bond is sufficient. And even assuming that the sheriff's jurisdiction to hear plaints is gone, but that his duty to replevy and take replevin bonds continues, the bond is sufficient. It follows substantially the 19th section of the 11 Geo. 2, c. 19, and it will be construed as requiring all that to be done which the statute requires. Thus a similar bond was held not merely to bind the plaintiff to prosecute his suit in the County Court, but to follow it into the Court above, and prosecute it there with effect; Gwillim v. Holbrook (b), and the cases there

The sheriff is not bound to take the bond precisely in the terms of the act. He may, for instance, add a clause for indemnifying him from all charges and damages by reason of the replevin, without affecting the assignability and Another. of the bond. [Short v. Hubbard (a); Dunbar v. Dunn (b); and Jackson v. Hanson (c), were cited.]

1849. EDMONDS v. Challib

Next, the attesting witness to the bond ought to have been called, and as it, and not the copy, was read at the trial, it was improperly admitted in evidence; Call v. Dunning (d); Gordon v. Secretan (e); Gillett v. Abbott (f), and Collins v. Bayntun (q). As to the question of damage, there was no evidence of any actually sustained. It is not enough for the plaintiff to shew that he may possibly suffer an injury from the alleged breach of duty; at all events the amount of the rent due at the time of the distress, and the expenses, are not the just measure of damages; for the plaintiff may have been paid his rent before the action was brought against the sheriff; Morris v. Robinson (h); Scott v. Henley (i); Bales v. Wingfield (k). Lastly, the declaration is bad in arrest of judgment; it avers only, that "at the time of taking the bond," the County Court had not, and that the district Court had, jurisdiction; whereas, it should have alleged, that the County Court had no jurisdiction at the time when the replevin suit was commenced, and that the district Court had jurisdiction at that time.

Cur. adv. vult.

COLTMAN, J., now delivered the judgment of the Court. -This was an action brought against the sheriff of Middlesex, for not having taken a replevin bond in conformity with the statute 11 Geo. 2, c. 19, s. 23. The cause was tried

```
(a) 9 Moore, 667; S.C. 2 Bing.
                                   & P. 24.
                                     (g) 1 Q. B. 117; S. C. 4 P.
349.
  (b) 10 Price, 54.
                                   & D. 544.
                                     (h) 3 B. & C. 196; S. C. 5 D.
  (c) 8 M. & W. 477; S. C. 1
Dowl. 69 N. S.
                                   & R. 34.
                                     (i) 1 M. & Rob. 227.
  (d) 4 East, 53.
  (e) 8 East, 548.
                                     (k) 4 Q. B. 580, note.
 (f) 7 A. & E. 783; S. C. 3 N.
```

EDMONDS
v.
CHALLIS
and Another.

before my brother Cresswell, and a verdict was found for the plaintiff for 35L; but leave was reserved to enter a verdict for the defendants, if the Court should be of opinion that the bond which was taken, was sufficient within the meaning of the act. In the ensuing Term, a rule nisi was obtained for entering the verdict for the defendants, or for a new trial, or to arrest the judgment. It appeared by the Judge's report, that the distress, out of which the action arose, was taken within the district of the Whitechapel County Court of Middlesex, and the condition of the bond was, that the obligor should appear at the next County Court, for the county of Middlesex, to be held at the house known by the name of the Sheriff's Office, in Red Lion Square, and should then and there prosecute her action with effect against George Ellis, for taking and unjustly detaining her goods, &c., and make return thereof, if return should be adjudged by law. The bond which has been taken in this case, is in a form often used before the passing of the act 9 & 10 Vict. c. 95; and the question is, whether such a form, since the passing of that statute, is sufficient. By the 119th section of the act, all actions of replevin in case of distress for rent in arrear, which shall be brought in the County Court, shall be brought without writ in a Court held under the act; and by section 120, the plaint shall be entered in the Court holden for the district wherein the distress was taken. this statute leaves the former statutes relating to replevin unrepealed, there is no reason why the sheriff, on complaint made to him, should not grant replevin as before, and take a bond under the stat. 11 Geo. 2, c. 19, as before; and if the bond had been taken in the terms of the statute, conditioned to prosecute the suit with effect and without delay, and to make return, if return should be awarded, the sheriff would have been under no difficulty. But the bond being taken with a condition for the party to appear at the next County Court for the county of Middlesex, to be holden at the Sheriff's Office in Red Lion Square, and then and there to prosecute her action with effect, and to make return, if return

should be adjudged, the question arises whether such a bond is sufficient.

EDMONDS

CHALLIS
and Another.

Various cases are to be found in which the Courts have held, that bonds not strictly conformable with the statute of 11 Geo. 2, c. 19, are assignable within that statute, so as to enable the assignee to maintain an action on the bond, where there had been a breach of one of the branches of the condition, which had been taken conformably to the statute. Thus, in the case of Short v. Hubbard (a), it was held to be no objection to such a bond, that it was conditioned, interalia, to indemnify the sheriff. So, in Dunbar v. Dunn (b), where the bond was conditioned to prosecute with effect, to make return, if, &c., and to indemnify the sheriff, it was held that the assignee might sue on the bond, though it was not conditioned to prosecute the suit without delay.

These were questions between the assignees of the sheriff, and the obligors of the bond; but the question may be different when it arises between the party distraining and the sheriff, who has taken a bond not conformable to the In order to determine this question, it will be convenient to consider the effect of a bond taken in the form here used, before the passing of the statute 9 & 10 Vict. c. 95. The object of taking a bond conditioned for the obligor to appear at the next County Court, and then and there to prosecute his suit, appears to be to secure the commencement of the action without delay so as to meet the requirement of the statute, that the obligor shall prosecute his suit without delay; and if the obligor omitted to appear at the next County Court, and there prosecute his suit, it was an infringement of the statute, and the bond was forfeited, and might be put in suit by the assignee; Dias v. Freeman (c). The effect and meaning of a bond conditioned, like the bond now in question, was under the consideration of the Court of Exchequer in the case of Jackson v. Hanson (d);

```
(a) 9 Moore, 667; S. C. 2 Bing.

349.

(b) 10 Price, 54.

(c) 5 T R. 195.

(d) 8 M. & W. 477; S. C.

1 Dowl. 69, N. S.

VOL. VL Q Q D. & L.
```

EDMONDS

5.
CHALLIS
and Another.

and the Court held the meaning of such a bond to be, that the obligor should appear at the next County Court, and then and there begin to prosecute his suit, and afterwards prosecute it with effect; and by prosecuting with effect is meant prosecuting with effect, not only in the County Court, but in every other Court into which the cause may be removed in ordinary course; Chapman v. Butcher (a); Now, the meaning, which ought Gwillim v. Holbrook (b). to be put on the bond, is not altered by the passing of the statute 9 & 10 Vict. c. 95; and the question will be, whether such a bond still is a substantial compliance with the requisitions of the statute 11 Geo. 2, c. 19, the condition of the bond being, first, that the obligor shall appear at the next County Court, and then and there begin to prosecute his suit. This branch of the condition will be merely idle, if the effect of the statute of Victoria is to substitute a proceeding in the district Court, in lieu of the old proceeding in the County Court; and it appears to us, that such is the intention and effect of the act. The words of the act (sect. 119), are express, that all actions of replevin in cases of distress for rent shall be brought in a Court held under the act; and it cannot be supposed that the plaintiff in replevin is to bring two concurrent actions, one in the old County Court, the other in the district Court. It must, therefore, be intended that the proceeding in the district Court should be substituted in lieu of the former proceeding in the County Court.

It may be said, however, that although this branch of the condition is idle, as imposing a duty on the obligor which the statutes do not any longer warrant, and for a breach of which the assignee of the bond could maintain no action, yet the rest of the condition is conformable to the statute 11 Geo. 2, c. 19, and may be enforced by the assignor on the bond. Now, the remaining branch of the condition is, that the obligor will prosecute his suit with effect; and the proceedings in replevin having been well

(a) Carth. 248.

(b) 1 B. & P. 410.

commenced in the first instance by the plaint to the sheriff out of Court, and the bond entered into to him, and the proceedings being, in effect, by force of the act 9 & 10 Vict. c. 95, directed to be transferred to the district Court and there prosecuted, the effect of this portion of the condition may be to bind the obligor to prosecute with effect in the district Court, on the same principle on which it was held, that such a condition bound him to prosecute, not only in the sheriff's Court, but in every other Court into which the cause might be removed in due course of law. Still there is another requisition of the statute, which the bond does not comply with; for the bond should be conditioned for the prosecuting of this suit without delay. stood before the passing of the statute 9 & 10 Vict. c. 95, this was considered as being sufficiently provided for, by requiring the obligor to appear at the next County Court, and then and there to prosecute his suit; but this provision is no longer applicable; the suit is no longer to be prosecuted in the County Court, but in the district Court. The district Courts are to be held, by sect. 56, at such times as the Judge shall appoint; and it may well be, that the Court for the district within which the distress was taken, and in which the plaintiff ought to enter his plaint, will be holden before the holding of the next County Court in the Sheriff's Office, in Red Lion Square. Be that as it may, there is no condition requiring the plaintiff to prosecute his suit at the next or any other district Court, and the proceeding may be indefinitely delayed without any breach of the condition of which the assignee of the bond can take We think, therefore, that the bond is insufficient; and, consequently, that the defendants are not entitled to have a verdict entered for them.

The ground on which the application for a new trial was rested, was a supposed misdirection in receiving in evidence the replevin bond, without due proof of the execution by the subscribing witness. It appeared by the report, that notice had been given to the defendants to produce the

EDMONDS

CHALLIS
and Another.

EDMONDS

CHALLIS
and Another.

bond, and the plaintiff's counsel called for the bond, which the defendants' counsel declined to produce. On the part of the plaintiff, a copy was produced, and proved to have been obtained from the Sheriff's Office, and was about to be read, whereupon the counsel for the defendants produced the original, and insisted that it could not be read until the subscribing witness had been called. The document, however, was read without the production of the witness; and it is contended that this ought not to have been done. We are, however, of opinion that the evidence was properly The document having been in the first instance kept back, and the plaintiff having entitled himself to read a copy without any proof being given that there was a subscribing witness to the original instrument, and having put it in to be read, the defendants' counsel let slip his opportunity, and had no right then to interpose and produce the original; and although in point of fact the original was read, that was but by a sort of legerdemain, and the proper evidence must be considered as having been read, which was the copy produced and proved by the counsel for the defendants. The case of Jackson v. Allen (a), bears out our view of the rights of the plaintiff's counsel under such circumstances.

Another ground on which the motion for a new trial was rested, was the amount of the damages, which were to the whole amount of the rent distrained for; but we see no reason to think them too large. If a bond had been taken, conditioned to prosecute without delay, the bond, under the circumstances of this case, would have been forfeited, and the amount of the rent would have been a reasonable measure of the damages. The case is not like the case of an escape on mesne process, for the distrainor has a real security for his debt, and if the replevin had not been granted he would have sold the goods, and would have put the money into his pocket. If a replevin bond is taken, and

afterwards forfeited, or if the sheriff omits to take a bond with a proper condition, the plaintiff ought to be put in as good a situation as he was in before.

1849. EDMONUS CHALLIS

The ground on which it was sought to arrest the judgment and Another. was, that the declaration only alleged that the County Court had not jurisdiction at the time of taking the bond, and that it ought to have alleged a want of jurisdiction at the time of the plaint to the sheriff; but we think that this is in substance alleged, for the allegation that the County Court had not jurisdiction at the time of taking the bond to try an action of replevin for taking and detaining the said goods, would not be true if it had had jurisdiction at the time of the plaint to the sheriff; for if it had had jurisdiction at that time, its jurisdiction having once attached, would have continued by virtue of the 4th section of the act, and would have existed at the time of taking the bond. rule, therefore, must be discharged.

Rule discharged.

WEBSTER, Bart. et Ux., v. DELAFIELD.

THE plaintiffs in this action having recovered judgment, The sheriff a fieri facias, indorsed to levy 5711 15s., was sued out, and goods in excthe furniture and other personal property in and about a cution, the attorney of A. house and premises occupied by the defendant, at Fulham, claimed them were, on the 4th of January, 1849, seized in execution. and, upon an

for his client, interpleader order being

obtained, attended before the Judge with an affidavit made by himself, stating that from documents in his possession, he believed the goods to belong to A., who was abroad and unable to make an affidavit or to travel. The Judge thinking the affidavit insufficient, made an order barring the claim, under the 3rd section of the Interpleader Act.

Held, per Wilde, C. J., Maule, J., and Cresswell, J., that the affidavit of the attorney was a sufficient statement of "the nature and particulars" of A.'s claim to satisfy the first section of the Interpleader Act, and that the order should be rescinded.

Held, per Williams, J., that the sufficiency of the statement was a question for the discretion of the Judge exclusively, and that the Court ought not to review the exercise of that discretion. Held, per totam Curiam, that an affidavit by the claimant himself in support of his claim

was not, under the above circumstances, necessary.

Semble, per Maule, J., that the statement of "the nature and particulars" of a claim under

the 1st section need not be made by affidavit.

WESSTER 9.
DELAFIELD.

On the 7th of the same month, Messrs. Rickards and Walker, as the attorneys of Henry Arthur Webster, served the sheriff with a notice that their client claimed the whole of the property seized; and the sheriff having, on the 10th, obtained the usual summons for an interpleader order, Rickards attended, on the 12th of January, before Coltman, J., at Chambers, on behalf of Webster, and proposed to read an affidavit, sworn by the latter before the British consul at Paris. The affidavit was objected to on the ground that it was not sworn before a competent person, and was, upon that ground, rejected. Rickards then read an affidavit made by himself, stating, that to the best of his belief the goods in question were the property of the claimant, and that the house and premises at Fulham, the title deeds of which were in deponent's possession, had been conveyed to him in 1847, and were still his property; that H. A. Webster had left England in the autumn of 1848, and entrusted his house and furniture to the custody and care of his housekeeper and servants. The learned Judge held that the affidavit was insufficient, but adjourned the summons to afford time for procuring a proper affidavit from Webster. Rickards again attended on the 19th, and produced another affidavit made by himself, stating, that from various documents, vouchers, receipts, invoices, and papers, in his possession, belonging to Webster, he believed the goods to be the bonâ fide property of Webster, and not of the defendant; that efforts had been made to obtain an affidavit from Webster sworn in Paris, but that such efforts had been ineffectual, as there was no competent authority in that city for that purpose, and that Webster's state of health prevented his coming to England. The learned Judge, thinking that the affidavit was insufficient, refused to make the interpleader order; but made an order under the third section of the Interpleader Act, barring the claim

Montague Smith having, on a former day in this Term, obtained a rule to rescind that order,



Bramwell shewed cause. The first question is, whether the claimant must support his claim by affidavit; and if so, then, secondly, whether the affidavit of Rickards is sufficient; for the affidavit of Webster was clearly inadmissible. **Powell v. Lock** (a) decides, that the claim must be made by affidavit; and that case has been always acted upon. it seems highly expedient that an affidavit (which must be filed) should be required, because otherwise there would be no record whatever of the claim having been made. [Maule, J.—The claimant is required, by the first section of the Interpleader Act (1 & 2 Wm. 4, c. 58), "to state the nature and particulars of his claim," but he is not bound to prove them, to the satisfaction of the Judge. It would be monstrous if a man who does not come voluntarily, but who is forced to come, before a Judge at Chambers to state his claim, should be summarily barred from prosecuting it because the Judge was not satisfied with his statement of Is the Judge in such a case to try the question upon affidavits, and to bar the claimant of his right to have his claim investigated by a jury?] On the other hand, it might be asked, will any statement of a claim satisfy the words of the act? [Maule, J.—Yes; section 3 enacts, that the claimant shall be barred if he does not appear to maintain his claim; but you would go further, and say that he shall be barred if he appears, but does not maintain his claim by affidavit to the satisfaction of the Judge]. Unless the Court are prepared to overrule Powell v. Lock, and to decide that not only no affidavit is necessary, but also that any statement, and a statement by any person, is sufficient, they will not rescind this order. If an affidavit be necessary, then the Judge has decided that the present one is insufficient, and the Court will not review his decision.

Montague Smith, in support of the rule. The learned

(a) 3 A. & E. 315.

WEBSTER

O.

DELAFIELD.

WEBSTER

O.

DELAFIELD.

Judge acted under a misapprehension of the meaning of the statute. The sixth section enacts, that when any claim is made by a third person to any goods and chattels taken in execution under process, it shall be lawful for the Court from which such process issued, upon application of the sheriff, to call before them by rule of Court, as well the party issuing such process as the party making such claim, "and thereupon to exercise for the adjustment of such claim, and the relief and protection of the sheriff or other officer, all or any of the powers and authorities" contained in the previous sections,—one of which (the third) enacts, that if such third party shall not, being duly served with the rule or order previously obtained for that purpose, appear to maintain his claim, or shall neglect or refuse to comply with any rule or order to be made after appearance, he shall be barred from ever after prosecuting it. Webster cannot be barred under this section, for it does not appear that he was ever served with the order or summons to appear, or that he has neglected or refused to comply with any rule or order made after his appearance, if his appearance by his attorney was sufficient. [Maule, J.—The words "shall neglect or refuse to comply with any rule or order to be made after appearance," seem to me to refer to the rules and orders which the Judge is empowered to make by the first section; and if the claimant does neglect or refuse, the act does not say that he "shall" be barred, but only that "it shall be lawful" for the Judge to bar him.] The act does not in terms require the claimant to appear in person, and it is submitted that his appearance by his attorney was sufficient. If so, it was competent for the attorney to make the claim, and his affidavit was sufficient.

Burchell appeared for the sheriff. If this order be rescinded, the sheriff, who has continued in possession of the goods to the present time, will lose the protection of the Interpleader Act; for it will be objected that he did

not apply promptly after receiving notice of the claim. [Cresswell, J.—If he be prejudiced, he can get a fresh interpleader order, stating the circumstances which have occurred in explanation of his apparent delay in applying].

WEBSTER

DELAFIELD.

WILDE, C. J.—After a full consideration of the circumstances of this case, I think the order of my Brother Coltman should be set aside. Many important questions have been raised upon which I am not prepared to decide; but my present opinion is founded upon the particular facts of this case, and is limited to it. It appears that the claimant is residing in a foreign country, and not able, therefore, to appear in person before the Judge. His attorney, however, appears for him to maintain his claim, and proposes to make use of a statement of his client, which the latter is not in a position to make upon oath, and which is on that account objected to, and rejected. The attorney then swears, that from documents in his possession, as well as from other grounds, he believes the goods in question are the property of the claimant, and not of the defendant. It may be that a party having a claim may be unable to come forward himself to maintain it, and that the best evidence that can be obtained, under the circumstances, in support of it, is the belief of another person who has the means of knowledge. Looking, therefore, to the facts of this case and the position of the client, I think that the affidavit of the attorney should have been deemed sufficient, without requiring one from the claimant himself. therefore, that the rule for rescinding the order should be made absolute, and that it should be made part of the present rule that the parties shall proceed to trial on a feigned issue, to try the title to the goods, the claimant being plaintiff, on the usual terms.

MAULE, J.—I am of the same opinion. And first, as to the necessity for any affidavit at all: the statute does not

WENSTER

8.
DELAPIRIO

say that the claim shall be stated by affidavit, but that the Judge shall make an order calling upon the party to appear and state the nature and particulars of his claim; and under certain circumstances, the Judge may bar him from prose-The application in this case was made by cuting his claim. the sheriff; but, for the present purpose, the act makes no difference between him and the defendant in an action. The first section of the Interpleader Act empowers the Court or a Judge to make an order upon a third party to do two things; first, to state the nature and particulars of his claim, (which, it has been held, he must do by affidavit, though it may be doubted whether that decision be correct); and secondly, to maintain or relinquish his claim. If he appears and maintains his claim, the Judge may order an action or an issue; or he may, with the consent of the plaintiff and of the claimant, dispose of the merits in a summary manner. The first section, however, gives no power to the Judge to bar the claimant; the third is the only section which gives him that power, and it enacts, that if the claimant shall not appear upon the order to maintain or relinquish his claim, being duly served therewith, or shall neglect or refuse to comply with any rule or order to be made after appearance, it shall be lawful for the Judge to declare him for ever barred from prosecuting his claim. If the party appears, he can only be barred if he neglects to comply with any order made after his appearance. In this case, no order has been made after his appearance, which he has neglected to comply with, and therefore, that state of facts does not exist, which alone gives the Judge jurisdiction to bar him. This seems to me to be the literal construction, and to be also a construction in conformity with the spirit of the act, which was intended to substitute a shorter and cheaper remedy in lieu of the tardy and expensive process of an interpleader bill in Chancery. The object of the Legislature was to provide a proceeding for the protection of the sheriff or any other person standing between two conflicting

claims, but at the same time to leave the rights of the conflicting claimants in, as near as possible, the same state as before the interpleader. The construction contended forthat a party must make a sufficient affidavit of his claim—is contrary to the spirit of the act. Before the interpleader order, the claimant was at liberty to sue out a writ, and bring his action without stating the particulars of his claims to any body; and this, his right at common law, it was not the object of the statute to restrict, except so far as it was necessary to do so for the protection of sheriffs and of defendants who had no interest in the subject-matter in dispute. Further to qualify that right, would give no additional advantage to the party applying for the interpleader order, and would at the same time prejudice the claimant, upon whom, therefore, there would be no reason for imposing such further restrictions any more than upon any one else. But it may be said, of what use is it to give a Judge the power to make an order, if that order may be disobeyed with impunity? The answer is, that it will not be disobeyed The purpose for which a Judge is emwith impunity. powered to call upon a claimant to state the particulars of his claim, is, that the claimant may have an opportunity of giving such evidence of it at once-for instance, if it arise from a marriage settlement, by the production of that settlement—as may satisfy the other side, and make him abandon his claim. If, however, he refuses to state the particulars of his claim, that may affect the discretion of the Judge as to costs, but the party is not for such a reason to forfeit his whole claim. It is said, that in the case of Powell v. Lock (a), where the application was made to the full Court, and not to a Judge at Chambers, the Court held, that the particulars of the claim should be stated by affidavit. The dicts of the Judges were, indeed, to that effect; but their decision was, that the party should have time to make an affidavit, and more than this they did not intend to

WEBSTER
v.
DELAFIELD.

WEBSTER

8.
DELAPIELD.

Nothing was said about the claimant being barred; and although the Court thought that there ought to be an affidavit, I do not think they took into consideration the question, whether the claimant's right should be barred if he did not produce one. On the broad ground, therefore, that no affidavit is required as a condition precedent to the Judge's making an order for a feigned issue under the first section of the act, I think that the learned Judge had no authority to make the present order, and that it should, therefore, be rescinded. But if I am wrong in this respect, I am not disposed to think an affidavit by the claimant himself necessary; nor does my Brother Coltman appear to have thought so, otherwise he would not have received the affidavit of the attorney at all. There is nothing in the statute that requires that the claim shall be made by the claimant himself; in many cases he may know nothing of the nature and particulars of it. Then, if the affidavit of the claimant is not necessary, I think the affidavit which was made, was not such an one as that a Judge could say it did not amount to a statement of the nature and particulars of the claim; and I am inclined to think, that any claim, however loose, is sufficient. For these reasons I am of opinion that the order of my Brother Coltman should be rescinded.

CRESSWELL, J.—I concur with the Lord Chief Justice and my Brother Maule, that, in this case, an affidavit from the plaintiff was not necessary; but, at present, and without pledging myself to a final opinion upon the point, I do not concur with my Brother Maule, that no affidavit whatever was necessary to support the claim. I forbear going into that question at present, for it is an important one, and it is not necessary to give any opinion upon it. I have been in the habit of acting at Chambers upon what I believed to be the decision in Powell v. Lock (a), and have always thought that the statute required that the claim

should be supported by affidavit. It is enough, however, in the present instance, to say that the claimant being absent, and not in a position to make an affidavit himself, the affidavit of his attorney, in this country, was sufficient; and, I, therefore, think that this rule should be made absolute.

WEBSTER

v.

DELAFIELD.

WILLIAMS, J.—I am sorry to say that I have the misfortune to differ from the rest of the Court; but it seems to me that we ought not to rescind the order of my Brother Coltman, because, if it be erroneous, it is only from his having drawn a wrong conclusion from facts in a matter within his discretion. If I were satisfied that he had made the order upon the ground that the claimant himself had not made an affidavit, I should concur with the rest of the Court that his decision was erroneous; for I think that the claim need not be supported by the affidavit of the claimant himself. But it seems to me, that the ground upon which the learned Judge proceeded was, that the claimant had not sufficiently stated the nature and particulars of his claim in compliance with the statute. I forbear from expressing any decided opinion as to whether an affidavit is necessary; but the inclination of my opinion is in accordance with that of my Brother Cresswell, viz., that the statute requires the party to state, not a sufficient claim, but his claim sufficiently, that is, by affidavit; and that if he does not do so, he may be barred. It seems to me, that it is for the Judge to decide whether the claim is sufficiently stated. Here he has decided that it was not; and I see no reason for disturbing his order.

Rule absolute to set aside the order, and for a feigned issue.

1849.

WOOLF v. THE CITY STEAM BOAT COMPANY.

In a declaration against a corporation, it is sufficient to describe the defendants by their corporate title, without stating how they were incorporated. A declara-

titte, without stating how they were incorporated.

A declaration which describes the defendants as a "company, impliedly alleges that the company is a corporation.

CASE.—The declaration stated that the plaintiff complained "of the City Steam Boat Company, who has been summoned to answer." &c.

Special demurrer, assigning for causes that the names of the defendants were not stated in the declaration; that if the defendants were sued as a corporation or as a company completely registered, the declaration ought to have stated by virtue of what act of Parliament the defendants were liable to be so sued.

Hugh Hill, in support of the demurrer. The question is, whether a declaration is good which describes the defendants as a company, but does not shew that they are a corporation or a completely registered company. declaration does not allege that they are a corporation, the plea of nul tiel corporation could not be safely pleaded. The Court will not take judicial notice of persons styling themselves a company. [Cresswell, J.—Is not this the usual mode of declaring against a corporation? does it appear that they have not got a charter? Maule, J.—If the defendants are a corporation, the language of the declaration is correct. If they are not, the implied allegation that they are, may be traversed.] In Reg. v. West (a), a coroner's inquisition, which found that certain railway carriages moving to the death of three persons were "the goods and chattels of, and in the possession of, the proprietors of the Hull and Selby Railway, and of the proprietors of the Leeds and Selby Railway," was quashed, on the ground that there never existed any such corporations so intituled. [Cresswell, J.-That case might have been in point, if the defendants were described as the proprietors of the City Steam Boats.]

Since the statutes creating registered corporations, they should be described as corporations by statute, although before those acts it might have been unnecessary to state how they were created. In Thompson v. The Universal Salvage Company (a), the defendants were described as a company duly registered under the 7 & 8 Vict. c. 110. [Cresswell, J.—What difference can the statutes make with respect to describing a corporation in pleading? Maule, J. -It may be that these defendants were incorporated by charter before any of the statutes were passed to which you refer.] If so, the declaration should have described them as incorporated by a charter. [Maule, J.—How is the plaintiff to know what their charter is?] In The Dutch West India Company v. Van Moyses (b), the plaintiffs were compelled at the trial to prove the instruments by which they were, by the law of Holland, effectually created a corporation there. [Maule, J.—That case shews that, as the plaintiffs called themselves a company, it was assumed that they were a corporation, and they were obliged to prove that they were. And if it is to be assumed in the case of a plaintiff, the same must be done in the case of a defendant.]

Hawkins, contrà, was stopped by the Court.

MAULE, J.—There is no positive rule, no precedent, and no practice, requiring such a description of a corporation as is contended for; nor is there any inconvenience in holding that the description of the defendants in the declaration implies the allegation that they are a corporation.

The rest of the Court concurring,

Judgment for the Plaintiff.

(a) 1 Exch. 694.

(b) 2 Ld. Raym. 1535, note.

WOOLF

BOAT COMPANY.

1849.

CROSSFIELD v. MORRISON.

The declaration stated. that upon the assignment of the lease of a coal mine from the plaintiff, the lessee, to the defendant, the latter covenanted with the former, that he, the defendant, his executors, administrators, or assigns, should, so long as he or they should be in possession of the mine, pay rent reserved: and should observe the covenants in the lease on the part of the lessee or assignee to be observed, or such of them as should be then subsisting, and should at all times there after indemnify the plaintiff against the rent and covenants contained in the lease, and against all actions, &c., in respect of such costs.

THE pleadings and facts of this case are so fully set forth in the judgment, that any other statement of them is unnecessary.

Whateley and Sir Thomas Phillips for the defendant, cited Sugd. V. & P. p. 756, 11th ed.; Nervin v. Munns(a); Browning v. Wright (b); Foord v. Wilson (c); Nind v. Marshall (d); Lambert v. Taylor (e); Goodburne v. Bowman (f); Plummer v. Lee (g); Gwynne v. Burnell (h); and Negelen v. Mitchell (i).

Talfourd, Serjt., and Dowdeswell, for the plaintiff, referred to 2 Wms. Saund. 319 e, n. (h), 6th ed., and Fillied v. Armstrong (k).

COLTMAN, J., delivered the judgment of the Court— This was an action of covenant, in which the declaration stated, "that Margaret Thomas and William Trew were seised in fee of the premises thereinafter mentioned to be

```
(a) 3 Lev. 46.
```

- (b) 2 B. & P. 13.
- (c) 8 Taunt. 543; S. C. 2 Moore, 592.
- (d) 1 B.& B.319; S.C.3 Moore, 703.
- (e) 4 B. & C. 138; S. C. 6 D. & R. 188.
 - (f) 9 Bing. 532; S. C. 2 M.

& Scott, 700.

- (g) 2 M. & W. 495; S. C. 5 Dowl. 755.
- (A) 6 Bing. N. C. 453; S. C.
- 1 Scott, N. R. 711.
 (i) 7 M. & W. 612; S. C. 1
- Dowl. 110, N. S.
- (k) 7 A. & E. 557; S. C. 2 N. & P. 406.

Breach, first, that the defendant, while in possession, did not pay certain rent, whereupon the plaintiff was obliged to pay; and secondly, that the defendant did not indemnify the plaintiff.

Pleas: first, a traverse of the demise; secondly, as to the deed of assignment which con-

Pleas: first, a traverse of the demise; secondly, as to the deed of assignment which contained the covenants, non est factum; thirdly, that when the rent accrued due, defendant was not in possession; fourthly, as to non payment of the rent, accord and satisfaction; fifthly, that the defendant did indemnify; and sixthly, that plaintiff did not pay the rent.

A verdict having been found for the defendant on the third issue, and for the plaintiff on all

A verdict baving been found for the defendant on the third issue, and for the plaintiff on all the others, and the Court,—being of opinion that the words restricting the first covenant to the time of the defendant's possession, did not extend to the covenant to indemnify; and that the third plea furnished no defence to the action: *Held*, that as the third plea was a traverse of an immaterial allegation, and as there were other pleas which were material, and which were disposed of on proper issues raised upon them, the plaintiff was entitled to judgment nos obstante veredicto, and that there was no necessity for a repleader.

demised; and being so seised, afterwards, to wit, on the 29th of July, 1835, by a certain indenture of lease then made between the said Margaret Thomas and William Trew of the one part, and the plaintiff of the other part, (which said indenture, sealed with the seals of the said Margaret Thomas and William Trew, the plaintiff now brings here into Court), for the consideration of the galiage, rents, payments, duties, covenants, conditions, and agreements thereinafter mentioned and contained, on the part and behalf of the plaintiff, his executors, administrators, and assigns, to be made, rendered, kept, done, and performed, the said Margaret Thomas and William Trew did demise, lease, and to farm let unto the said plaintiff, his executors, administrators, and assigns, all and singular the mine, vein, pit, grove, bed, and hole of coal called 'the large vein,' being a mine of coal commonly worked in the parish of Monythusloyne, lying in and underneath all those two several messuages or dwelling-houses, out-houses, &c., and the several closes of lands, arable, &c., which were more particularly delineated, together with the quantities, meres, metes, and bounds thereof, in or by the map or plan indorsed in the first skin of the said indenture, and which lands were called and known by the several names of Tyn-y-Gelly or Twyn-Gelyn Fields, then in the several and respective tenures and occupations of John Jones and Richard Lewis, and were situate in the said parish of Monythusloyne, in the county of Monmouth, containing, by measurement, forty-six acres, or thereabouts, excepting always so much of such parts of the said veins of coal as might be necessary to remain unworked for the purpose of supporting and keeping effective the main level or tramroad hereafter mentioned, leading or extending from the Pentwyn lands, under and through the lands of the said Margaret Thomas and William Trew, to the Peny-Van-Issa coal lands; and also full and free liberty, license, and authority, to and for the plaintiff, his executors, &c., and their respective miners, &c., to open, dig, search for, &c.,

1849.
CROSSFIELD

8.
MORRISON.

VOL. VI. RR D. & L.

1849.
CROSSFIELD

MORRISON.

and get all the coal thereby demised (except as aforesaid); and to dig, sink, &c., and make any pits, shafts, &c., in, under, upon, or about the said lands, as well for the working of the coal duly demised, as for the purpose of hauling, &c., any other coal or minerals, the produce of any other colliery or estates; and particularly to continue the main level or carriage-road then in progress through the Pentwyn lands, under and through the said lands of the said Margaret Thomas and William Trew, to the said Peny-Van-Issa coal lands; and also to erect, &c., in and upon the said lands, &c., store-houses, smithies, &c., for the better and more effectual working the said colliery or coal mines, and the accommodation of the colliers, miners, and others who should be from time to time employed in and about the said colliery and mines, but no such building or machines should be erected within one hundred yards of any dwellinghouse then being upon the said lands, without the consent of the said Margaret Thomas and William Trew, their heirs, &c., had and obtained; and also to construct and make yards, spoil-banks, and deposits of coal or rubbish, upon the said lands, and for the purpose of using and exercising the several powers and authorities thereby granted; and to take, use, and occupy so much of the surface of the said lands as might be reasonably necessary to the said plaintiff, his executors, &c., he and they paying for so much of such parts of the surface of the said lands as might be used for any of the purposes aforesaid, the fair and just value thereof; and also to raise and quarry from and out of the said lands, and to use in the erection of the buildings and works to be set up under the purchase or conveyance, all such stone, clay, and land as might be reasonably required for such purpose; and likewise full and free license and authority to bring up and convey through, and work, raise, and get up by means of, the said lands thereinbefore described, or any part thereof, from or out of any other lands, any other coals and minerals whatever, than those thereby demised; and likewise full and free liberty of ingress and egress to and for the said plaintiff,

his executors, &c., workmen, labourers, &c., in and upon the said farm and lands, with horses, &c., to and fro, working, hauling, and carrying away the said coal, and the using and exercising the several powers thereby granted, at all'times, at his and their will and pleasure, without any interruption, molestation, &c., by the said Margaret Thomas and William Trew, or either of them, their heirs or assigns, or the heirs or assigns of either of them, subject, nevertheless, to the covenants and restrictions on the part of the lessee thereinafter contained. To have, hold, &c., the said mines, vein, pit, grove, bed, and hole of coal, except as aforesaid, and all and singular other the privileges, liberties, powers, and premises thereby granted, demised, and leased as aforesaid, or intended so to be, with their and every of their appurtenances, unto the said plaintiff, his executors, &c., from the 1st of May, 1834, for, and during, and unto the full end and term of twenty years thence next ensuing, and fully to be complete and ended; and to have and to hold all and every the coal thereby demised, and which should or might be found or raised during the said term thereby granted, or intended so to be, unto him, the said plaintiff, his executors, &c., and as his and their own proper goods and chattels; yielding and paying therefore, for every ton of such marketable coals of the weight of 20 cwt., of 112 lbs. to the cwt., that should be gotten and brought out from and underneath the said lands, and being the produce thereof, the royalty, galiage, or sum of 9\(d \), and, also, in case such royalty, galiage, or sum of money should not amount to the yearly sum of 426l. 5s., then yielding and paying, during so many years of the said term thereby granted as the said coals thereby demised, except as aforesaid, should continue unworked, and then existed, and until all such marketable coal, except as aforesaid, as according to the usual mode of working, or to be worked out, should be exhausted, but no longer, such further amount, rent, or royalty as with the said galiage, in case any should become due, should amount in the whole to the yearly rent or sum

1849.
CROSSFIELD
v.
MORRISON.

1849.
CROSSFIELD

of 4261. 5s.; but in case no such galiage should become due, then yielding and paying the yearly rent or sum of 426l. 5s., such yearly rent to be computed from the commencement of the said demise; and also yielding and rendering, on demand, so long as any of the coals thereby demised should be worked, at least one ton and five cwt. of coals weekly, for the use of the said Margaret Thomas and William Trew, free of charge, such coal to be delivered on the tram-road of the Monmouthshire Canal Company, at the point where the coals worked should be first placed upon such tram-road; and also yielding and paying for such quantity of coals as should remain unworked, for the purpose of supporting the said road leading from the Pentwyn lands to the Peny-Van-Issa coal fields, the said galiage of 93d. per ton, of the weight aforesaid; and also yielding and paying for every five tons and a half of coal, of the weight thereinbefore mentioned, not being the produce of the lands thereinbefore described, which should be conveyed by the said plaintiff, his executors, &c., or any other person or persons, by his or their authority, to the said lands, and which should have been raised and gotten from and out of the Peny-Van-Issa estate, and property of Robert Phillips, Esq., the way-leave or sum of 93d."

Then follow other stipulations not necessary now to state; and then the declaration goes on—" And the plaintiff did thereby, for himself, his heirs, &c., covenant, &c., to and with the said Margaret Thomas and William Trew, their heirs, &c., that he, the said plaintiff, his executors, &c., or some or one of them, should and would well and truly pay, or cause to be paid, unto the said Margaret Thomas and William Trew, or to one of them, or to their heirs or assigns, or the person or persons who, under the reservations thereinbefore mentioned, should be entitled to receive the same, the said rent, galiage, and way-leave, and yield and render the coal thereby reserved at the respective times and in the manner and proportion therein mentioned. And whereas, also, during the continuance of the said

demise, to wit, on the 1st of January, 1840, by a certain indenture of assignment then made between the plaintiff, of the first part; the defendant, of the second part; and one John Reid, of the third part; which said indenture, sealed with the seal of the defendant, the plaintiff now brings here into Court, &c.; the plaintiff, for the considerations therein mentioned, did bargain, sell, assign, transfer, and set over unto the said John Reid, his executors and assigns, all and singular the mine, &c., liberty, privilege, &c., and appurtenances demised by, and then held under and by virtue of the said indenture of lease, except as therein mentioned, &c., to hold, &c.; and it was thereby declared by the parties to the said indenture, that the said John Reid, his executors, &c., should stand possessed of all and singular the premises thereinbefore assigned or otherwise assured, or intended so to be, in trust for the said defendant, his executors, administrators and assigns, until default should be made by him in the payment of the sum of 1,575L and interest, or any part thereof respectively, in the shares, or at the times, and in the manner thereinbefore appointed for the payment thereof respectively, or until default should be made by the said defendant, his heirs, &c., in the performance of the covenants thereinafter contained on the part of the said defendant; and upon this further trust, that if the said defendant, his heirs, &c., should pay, or cause to be paid, the said sum of 1,575L, and the interest thereon, to the plaintiff, his executors, &c., in the shares and at the times, &c., and should duly and faithfully perform the covenants of him, the said defendant, then and in that case he, the said John Reid, his executors, &c., should, immediately after such payment should be so made, &c., assign the said mine, &c., to the defendant, for the residue, &c.; but if default should be made by the said defendant, &c., in payment of the said sum of 1,575L, &c., or if default should be made in the performance of the covenants, &c., that he, the said John Reid, his executors, &c., should absolutely sell and dispose of the said mine, &c. And the said defendant

1849.
CROSSFIELD

5.
MORRISON.

18-19.

CROSSFIELD

MORRISON.

did thereby, for himself, his heirs, &c., covenant, &c., to and with the plaintiff, &c., that he, the said defendant, his executors, &c., or some or one of them, should and would, at all times during so long as he should be in the possession or receipt of the rents, produce, and profits of the said premises thereby assigned, upon the trusts thereinbefore contained, well and truly pay, or cause to be paid, unto the lessors of the said premises, or other the persons who, under the reservations contained in the said lease, should be entitled to receive the same, the rents, galiages, and wayleaves therein reserved and made payable, and should and would render the coal therein reserved at the respective times and in the manner and proportion therein mentioned, and should observe, perform, and fulfil all other the covenants, conditions, provisions, and agreements therein contained, which, on the part of the lessee or assignee of the said premises, ought to be paid, observed, and performed, or such of them as then remained subsisting, unperformed, and capable of taking effect; and should and would, at all times thereafter, effectually keep harmless and indemnified the said plaintiff, his heirs, &c., and also the said John Reid, his executors, &c., of, from, and against the rents, covenants, provisions, stipulations, and agreements reserved and contained by and in the said indenture of lease, and of, from, and against all actions, &c., for and in respect of the same covenants, &c., in relation thereto. And the plaintiff further saith, that, after the making of the said indenture of lease, and during the continuance of the said premises, to wit, on the 20th of September, 1846, the said William Trew departed this life, leaving the said Margaret Thomas him surviving, who thereupon, &c., became and was seised of the reversion of and in the said demised premises, and entitled to the rents, galiages, and way-leaves reserved and made payable by the said indenture of lease as aforesaid; and being so seised and entitled, the said Margaret Thomas, hereinbefore and after the 1st of January, 1838, to wit, on the 18th of July, 1838, duly made and published her last

will and testament in writing, bearing date the day and year last aforesaid, and which said will was then duly signed at the foot thereof by the said Margaret Thomas, in the presence of three credible witnesses present at the same time, and was then attested and subscribed by the said witnesses in the presence of the said Margaret Thomas, according to the form of the statute in such case made and provided; and thereby, amongst other things, gave and devised the said demised premises unto Dacey Miles, Elizabeth Watkins, and Moses Watkins, theirs heirs and assigns, and thereby appointed the said Dacey Miles, Elizabeth Watkins, and Moses Watkins the executors of the will; and the said Margaret Thomas afterwards, to wit, on the day and year last aforesaid, died, and the trust and the reversion of and in the said will, as to the said devise of the said demised premises, thereupon became and were the property of the said Dacey Miles, Elizabeth Watkins, and Moses Watkins, who then became and were seised of the said reversion in their demesne as of fee; and being so seised, afterwards, to wit, on the day and year last aforesaid, the said Dacey Miles and Moses Watkins departed this life, leaving the said Elizabeth Watkins, who then became, and at the time of the assignment by the plaintiff as hereinafter mentioned, was seised of the said reversion in her demesne as of fee, and was the person who, under the reservations contained in the said lease, was entitled to the rents, galiages, and way-leaves therein reserved and made payable."

The declaration further states, "that afterwards, and whilst the defendant remained and was in possession and receipt of the said rents, produce, and profit of the said premises, by the said last mentioned indenture of assignment, under the trusts in the said indenture of assignment contained, to wit, on the 10th of August, 1846, a large sum of money, to wit, the sum of 106*l*. 11s. 3d., of the rent or sum of 426*l*. 5s., of the yearly rent aforesaid, reserved by the said indenture of lease, became and was due and payable to the said Elizabeth Watkins, under and by virtue of the said

1849.
CROSSPIELD
v.
MORRISON.

1849.
CROSSFIELD
v.
MORRISON.

indenture of lease, for one quarter's rent, due on the day and year last aforesaid; and that afterwards, and whilst the defendant remained and was in possession or receipt of the said rents, produce, and profits as aforesaid, to wit, on the 1st of November, in the year last aforesaid, a certain other large sum of money, to wit, the further sum of 106L 11s. 3d., of the rent or sum of 4261. 5s., of the yearly rent aforesaid, reserved by the said indenture of lease, also became and was due and payable to the said Elizabeth Watkins, under and by virtue of the said indenture of lease, for another quarter's rent, due on the day and year last aforesaid; and that afterwards, and whilst the defendant remained and was in possession or receipt of the said rent, produce, and profits as aforesaid, to wit, on the day and year last aforesaid, a certain other large sum of money, to wit, 1111. 18s. 4d., for galiage rent, of 9\frac{3}{2}d. per ton, of the weight aforesaid, for 2755 tons of coal, which remained unworked, for the purpose of supporting the said road leading from the Penwyn lands to the Peny-Van-Issa coal lands, became and was also due and payable to the said Elizabeth Watkins, under and by virtue of the said indenture of lease, and of which the defendant then had notice. Yet the said defendant and the said Joseph Reid, although often requested so to do, did not, nor would either of them, pay the said rents of 106L 11s. 3d., 106L 11s. 3d., and 111L 18s. 4d., or any or either of them, or any part thereof, or give their or either of their promissory notes or acceptances for the same, or any part thereof, but wholly neglected and refused so to do: and thereupon, afterwards, and before the commencement of this suit, to wit, on the 2nd of December, 1846, the now plaintiff was called upon to pay, and was forced and obliged to pay, to the said Elizabeth Watkins, a large sum of money. to wit, the sum of 250L, for, and on account, and in satisfaction and discharge of the said last mentioned rents, and which were then due and payable to her as aforesaid, under and by virtue of the said indenture of lease; and the plaintiff was also put to great costs and charges in consequence

of the non-payment of the said rents, and non-performance of the covenants in the said lease contained as aforesaid, in the whole amounting to a large sum of money, to wit, the sum of 3501.; of all which the defendant, afterwards, and before the commencement of this suit, on the day and year last aforesaid, also had notice; yet the said defendant, disregarding the said covenant in that behalf made as aforesaid, hath not, although often requested so to do, kept harmless and indemnified the plaintiff of, from and against the said rents, covenants, &c., reserved and contained by and in the said indenture of lease, and of, from, and against all actions, suits, costs, and charges for or in respect of the covenants, &c., or otherwise in relation thereto; but, on the contrary thereof, hath wholly neglected and refused, and still neglects and refuses, to keep harmless and indemnified the plaintiff against the said sums of 1061. 11s. 3d., 106l. 11s. 3d., and 111l. 18s. 4d., so by him paid to the said Elizabeth Watkins for the rent aforesaid, or any or either of them, and the costs, charges, &c., by him sustained as aforesaid, in consequence of the non-payment of the said rents and non-performance of the said covenants."

To this declaration the defendant pleaded, first, that Thomas and Trew did not demise as alleged.

Secondly, that the supposed indenture of assignment is not the deed of the defendant.

Thirdly, that at the times respectively when the rents or sums of 106*l*. 11s. 3d., 106*l*. 11s. 3d., and 111*l*. 18s. 4d., or any or either of them, became due, the defendant was not in possession or receipt of the said rents, produce, or profits of the said premises by the said indenture of assignment assigned, in manner and form as alleged.

Fourthly, as to so much of the said declaration as relates to the non-payment of the said rents or sums, the defendant says, that after the accruing of the causes of action, and before the commencement of this suit, the defendant paid to the plaintiff, and the plaintiff accepted from the defendant, divers sums of money, amounting to, &c., in full

1849. CROSSFIELD v. MORRISON. 1849.
CROSSFIELD

v.
MORRISON.

satisfaction and discharge of the damages and causes of action in the declaration mentioned.

Fifthly, as to so much of the declaration as relates to the defendant not having kept harmless and indemnified the plaintiff, the defendant says that he did keep harmless and indemnified the plaintiff against the said rents, &c., and of, from, and against the costs and charges, according to his, the defendant's, covenant.

And, sixthly, as to the causes of action in the introductory part of the fourth plea mentioned, the defendant says, that the plaintiff did not pay the said monies, or any part thereof, nor did he sustain any costs, charges and expenses, in manner and form, as alleged.

Issue was joined on these pleas.

On the trial the verdict passed for the plaintiff on all the issues joined, except that on the third plea, which was found for the defendant, but leave was reserved for judgment to be entered upon that issue for the plaintiff, for 266l. 10s., if the Court should be of opinion that the plaintiff was entitled to judgment, notwithstanding the verdict on the issue on that third plea.

On the argument before us it was insisted, on the part of the defendant, that the defendant was only bound to pay the rents and galiages, and to perform the covenants, during such time as he should be in possession, and that the covenant to indemnify must be construed with a similar restriction, for that it could not be supposed that the defendant would agree to indemnify the plaintiff against the breach of any covenants other than those he undertook to perform; and as he undertook to perform the covenants during such time only as he should be in possession, it could not have been the intention that he should be bound to indemnify against the breach of any other covenants but such as were and ought to be performed during the time he was in possession. But we think the covenant to indemnify is not to be so construed. At the time the deed was executed, it was probably in contemplation of the parties

that the defendant should pay the stipulated sum of 1,575l., and remain in possession of the colliery; and under that expectation it was, of course, that the defendant entered into the covenant to pay the rents and perform the covenants during the time he should be in possession. parties must also have contemplated the possibility of the defendant making default in paying the stipulated sum, and of the colliery being sold by Reid under the trust deed. On such sale taking place, it was to be expected that the covenants would be entered into by the purchaser to perform the covenants of the original lease; but the purchaser might make default in performing them, and it was, therefore, reasonable the plaintiff should require from the defendant a covenant to indemnify him against any breach of the covenants of the original lease, or any of them. Nor could the defendant reasonably object, as it would be only in consequence of his own default that a sale would take place; and if we look at the terms of the covenant entered into by the defendant, they are consistent with this view of The first covenant is, that the defendant would at all times, as long as he was in possession, pay the rents, &c.; and the latter covenant is, without restriction, that he would at all times indemnify.

Such being, in our opinion, the true construction of the covenants, the question arises, whether the third plea furnishes any defence to the action. It appears by the declaration, that the assignment to Reid, as trustee, was made on the 1st of January, 1840; and that the sums on which the question arises, became payable after the assignment. It is also alleged in the declaration, that those sums became due and payable during the time the defendant was in possession. The payment of the sums in question is alleged to have been made afterwards—that is, after they were due and payable; but it is not alleged to have been made whilst the defendant was in possession. The plea does not deny that the sums in question became due to

1849.
CROSSFIELD

b.
MORRISON.

1849.
CROSSFIELD
v.
MORRISON.

Elizabeth Watkins after the assignment to Reid, but denies that the defendant was in possession or receipt of the rents when those sums became payable. As far as the covenant to pay the rents is concerned, such a plea appears to us a sufficient answer, for the defendant is only bound to pay whilst in possession; but it is no answer to a covenant to indemnify, it being immaterial whether the defendant was in possession or not. The plea which professes to answer the whole declaration does, in fact, leave a material part of the declaration unanswered; and the issue raised by it is, with reference to the decision of this cause, an immaterial issue.

The next question is, whether the plaintiff is entitled to judgment non obstante veredicto, or whether there should be a repleader. It appears to us there is no occasion for a repleader. The case falls within the reason of the rule laid down by the Court of Exchequer in Negelen v. Mitchell (a), that if one of several pleas traverses an immaterial allegation in the declaration, and the defendant pleads other and material matters, which are disposed of on the proper issues, the reason for the repleader ceases. We therefore think, in this case, there should be

Judgment for the Plaintiff non obstante veredicto.

(a) 7 M. & W. 612.

1849.

CAUNT v. THOMPSON.

A SSUMPSIT by indorsee against drawer of a bill of A declaration exchange for 20L, drawn by defendant on, and accepted by Whitley, payable two months after date, indorsed by de- of a bill of fendant to Tomlin, and by him to plaintiff. Averment of averred prepresentment to, and non-payment by, the acceptor, and and non paynotice to the defendant; concluding with the usual promise ment by, the to pay, and breach, non-payment.

Pleas, inter alia, first, that the bill was not presented to traverse of the the acceptor; and secondly, that the defendant had not presentment, and that he due notice of dishonour, modo et formâ.

Upon the trial before Wilde, C. J., at the Middlesex sittings after Michaelmas Term, 1847, the following facts were proved. The acceptor died before the bill became due, having appointed the defendant his executor, who proved the will. When the bill became payable, Tomlin due; that the called, on behalf of the plaintiff, at the acceptor's residence, to present the bill for payment, and seeing the defendant there, presented it to him, saying, "I have brought a bill the residence from Caunt; you know what it is;" to which the defendant and seeing the replied, "You must get Mr. Caunt to let it stand over for a few days, as Mr. Whitley has only been dead a few days: of his being the executor I am his executor and will see that the bill is paid." plaintiff, upon this evidence, applied for leave to amend his the bill to him. declaration, by striking out the averment of presentment that the Judge to, and non-payment by Whitley, and substituting in its had properly place a statement of the death of Whitley, of the appoint- claration to be ment of the defendant as his executor, and of presentment striking out to the defendant as such executor. This amendment was the averment objected to, but allowed. The defendant also objected that ment, and subthere was no proof of notice of dishonour, contending that statement of

by indorsee sentment to. acceptor. The defendant pleaded a had had no notice of dishonour. Upon the trial, it was proved that the acceptor had died before the bill became drawer was his executor, and that the holder had called at of the acceptor, drawer, who informed him The of the acceptor,

amended, by of presentstituting a the death of the acceptor.

of the defendant being his executor, and presentment to the defendant as executor. And secondly, that the defendant had, as drawer, sufficient notice of dishonour. CAUNT E. THOMPSON.

the presentment to the executor was not such notice. His Lordship having ruled accordingly, the verdict was entered for the plaintiff upon the first issue, and for the defendant on the second; leave being given to the plaintiff to move to enter the verdict on the latter issue for himself, or for judgment non obstante veredicto; and to the defendant to move to have the verdict entered for him on the first issue, on the ground that the amendment ought not to have been allowed. In Hilary Term, 1848, cross rules were granted accordingly, which were argued during the sittings after Michaelmas Term last.

Dowdeswell and Couch for the defendant. amendment ought not to have been allowed. section of the 3 & 4 Wm. 4, c. 42, was only intended to apply to variances between the statement upon the record and the proof of substantially the same matter, and not to cases where the matter proved is entirely different from that which is alleged; Boucher v. Murray (a). As the declaration originally stood in this case, there was an averment of presentment to Whitley, which the defendant traversed; the amendment introduced, in the place of that allegation, an entirely new statement of facts, which the defendant ought to have had, but had not, an opportunity of traversing. [Cresswell, J.—Why did you not apply to the Judge at the trial for leave to traverse them? The statute contemplates the case of an amendment which, although not material to the merits, may prejudice the opposite party in the conduct of his defence, and gives the power in such a case to postpone the trial. It was not material to the merits whether the bill was presented to the acceptor or to his executor; and if the defendant had felt embarrassed or prejudiced in his defence, he ought to have pointed it out to the Judge, or asked him to postpone the trial.] Secondly, the issue upon the plea that the

defendant had no notice of dishonour was rightly found for the defendant. The evidence shewed only that the defendant, as the executor of the acceptor, had knowledge of the non-payment, not that he had notice as drawer, that he would be looked to in that character for payment. The latter is the notice to which the plea refers; and the mere knowledge of the fact that the bill has not been paid is not such notice; Solarte v. Palmer (a); Burgh v. Legge (b). [Furze v. Sharwood (c); King v. Bickley (d); Sharp v. Bailey (e), and Buxton v. Jones (f), were also cited and commented upon.]

Caunt v.
Thompson.

Lush, for the plaintiff. [The Court desired him to address himself to the second point only, as they were of opinion that the amendment was properly allowed.]. The evidence supported the second issue. Burgh v. Legge only shewed that mere knowledge, before the bill is due, that it will not be paid, is not a sufficient notice of dishonour; but in this case everything which it was necessary to prove, in order to establish the liability of the drawer, was proved, viz., notice that the bill had been presented for payment, and that it was not paid. It was not necessary to shew that the drawer was informed that he should be looked to for payment; Furze v. Sharwood; Miers v. Brown (g). But further, the plaintiff is entitled to judgment non obstante veredicto; for no notice to the defendant was necessary, it being well established that where there is no person except the drawer to pay, he is not entitled to notice of dishonour; Sharp v. Bailey; Fitzgerald v. Williams (h).

Cur. adv. vult.

```
(a) 1 Bing. N. C. 194; S. C.
1 Scott, 1.
(b) 5 M. & W. 418; S. C. 7

Dowl. 814.
(c) 2 Q. B. 388; S. C. 2 G.
& D. 116.
(d) 2 Q. B. 419.
(e) 9 B. & C. 44.
(f) 1 M. & Gr. 83; S. C. 1
Scott, N. R. 19.
(g) 11 M. & W. 372.
(h) 6 Bing. N. C. 68; S. C.
8 Scott, 271.
```

CAUNT b.
Thompson.

CRESSWELL, J., now delivered the judgment of the Court (a). [After stating the pleadings and the facts in the case, his Lordship proceeded:]—At the argument we disposed of the defendant's rule, thinking the amendment properly allowed; and now, after consideration, we think that the plaintiff's rule to enter a verdict in his favour on the second issue, must be made absolute. It may be assumed to be a settled rule, that knowledge of the probability, however strong, that a bill of exchange will be dishonoured, cannot operate as a notice of dishonour, or dispense with it. Pothier (Contrat de Change, pt. 1, c. 5, s. 147) lays down the same rule with reference to foreign bills, namely, that the notorious insolvency of the acceptor of a bill does not dispense with protest for non-payment and notice to the prior parties, because the insolvency of the acceptor, however notorious, may not be known to them; or, in the absence of notice, they may suppose that the acceptor, although insolvent, has found means to take up the bill. So also it may be considered as settled, that information that a bill has been dishonoured, derived from a person not having authority to give it, does not supply the place of notice. Hence it has become usual to say, that knowledge of the dishonour of a bill is not equivalent to notice. In such cases as those above mentioned it certainly is not. The law has not been so well settled as to the nature of the notice to be given. In Hartley v. Case (b), Abbott, C. J., said, "There is no precise form of words necessary to be used in giving notice of the dishonour of a bill of exchange, but the language used must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor." that case was decided there has been some fluctuation of opinion on the subject. In Solarte v. Palmer (c), which was finally decided in the House of Lords, a very strict rule

⁽a) Coltman, J., Maule, J.,

⁽b) 4 B. & C. 339.

Cresswell, J., and Williams, J. (c) 1 Bing. N. C. 194.

1849.

CAUNT

Тномрвом.

was adopted; but that has not been adhered to. In Burgh v. Legge (a), Parke, B., says, "There must be proof of a notice given from some party entitled to call for payment of the bill, and conveying in its terms intelligence of the presentment, dishonour, and parties to be held liable in consequence." But in Furze v. Sharwood (b), and King v. Bickley (c), it was decided, that the notice need not in terms inform the party to whom it is given that he is looked to for payment; and in Miers v. Brown (d), these decisions were followed. The rule does not differ in substance from that given by Ashurst, J., in Tindal v. Brown (e), "Notice means something more than knowledge; because it is competent to the holder to give credit to the maker." (The action was on a promissory note). "It is not enough to say that the maker does not intend to pay, but that he, the holder, does not intend to give credit." In substance, these cases seem to establish, that in order to make a prior holder responsible, he must derive from some person entitled to call for payment, information that the bill has been dishonoured, and that the party is in a condition to sue him, from which he may infer that he will be held responsible. Brown, Alderson, B., describes what is needful in these terms, "Knowledge of the dishonour, obtained from a communication by the holder of the bill, amounts to notice." In the present case, the defendant knew that the bill was dishonoured, and he knew it from the best source, namely, his own personal act in dishonouring it when presented by the holder; and he knew from the same source that time had been given to the acceptor. therefore, all the information which, according to Ashurst, J., the notice ought to convey; and, knowing that, he would know also that the holder had placed himself in a situation to call upon him (the drawer) for payment, from which (to adopt the view of modern decisions) he might infer that he

D. & L. VOL. VI. 8 8

⁽d) 11 M. & W. 372. (a) 5 M. & W. 418. (e) 1 T. R. 167, 169. (b) 2 Q. B. 388.

⁽c) 2 Q. B. 419.

CAUNT v. Thompson.

would be called upon. This is very different from that knowledge which has been spoken of as not equivalent to notice; and is, at least, as much notice as the knowledge spoken of by Alderson, B., in Miers v. Brown (a). Indeed, there would be some absurdity in requiring that the plaintiff should have stated to the defendant, at the time when he dishonoured the bill, "Take notice that this bill has been dishonoured by you." Lord Ellenborough seems to have been of that opinion in the case of Porthouse v. Parker (b), an action by the payee against the drawers of a bill. It was drawn by one Wood, as agent of George James and John Parker, upon John Parker. There was no proof that Wood had authority to draw; but evidence being given that the bill was accepted by a duly authorized agent for John Parker, Lord Ellenborough held that it was evidence of the bill having been regularly drawn, and that the acceptor being likewise a drawer, there would be no occasion for the plaintiff to prove that the defendants had received express notice of the dishonour of the bill, as this must necessarily have been known to one of them; and the knowledge of one was the knowledge of all. Upon the authority of that case, and upon principle, we think that the notice to the defendant in this case was established, and that the verdict should be entered for the plaintiff on the issue on the second plea.

Plaintiff's rule absolute.

Defendant's rule discharged.

(a) 11 M. & W. 372.

(b) 1 Campb. 82.

REGULA GENERALIS.

EASTER TERM, 12 VICT.

It is ordered, that where a rule for judgment as in case of a nonsuit shall have been discharged on a peremptory undertaking to try at the next or any future assizes or sittings, if the plaintiff shall make default in proceeding to trial pursuant to his undertaking, the defendant shall be at liberty, if the plaintiff does not draw up the rule, to draw it up at any time before moving for judgment, and thereupon to move for judgment without serving a copy of the rule on the plaintiff.

(Signed)	THOS. WILDE,	R. M. Rolfe,
	Fred. Pollock,	C. Cresswell,
	J. Parke,	W. Erle,
	J. Patteson,	T. J. PLATT,
	J. T. Coleridge,	E. V. WILLIAMS.
	T. COLTMAN	

COURT OF EXCHEQUER.

Baster Cerm.

IN THE TWELFTH YEAR OF THE REIGN OF VICTORIA.

1849.

PILKINGTON v. RILEY and Others.

The 3 & 4
Wm. 4, c. 90
(The Lighting and Watching Act) is a public act, and the power given therefore by the 69th section, of pleading the general issue, and giving the special matter in evidence, is not taken away by the 5 & 6
Vict. c. 97, s. 3.

A notice of action under the above section against inspectors appointed under the provisions of the statute, for illegally executing a distress under TRESPASS for breaking and entering the close of the plaintiff, at Accrington, in the county of Lancaster, and seizing and taking her goods.

Plea, not guilty by statute.

The case was tried before Coleridge, J., at the last Lancaster Spring Assizes, when the following facts appeared. The plaintiff was a bleacher, and carried on her business in the township of New Accrington, in the county of Lancaster. The defendants were the inspectors appointed under the provisions of the Lighting and Watching Act, 3 & 4 Wm. 4, c. 90. The plaintiff having refused to pay a lighting rate, whereby her brother, Abraham Pilkington, and herself were assessed as inhabitants and occupiers of premises in the said township of New Accrington, a distress was issued under a warrant of justices, and, on the 2nd of February, 1848, her goods seized. The present action was thereupon brought to recover damages for the distress. On

a warrant of justices issued for non payment of a rate, given in the name of two persons, one being at the time dead, is bad.

Quare, whether such a notice is not bad, for merely stating that an action will be commenced, without specifying the particular kind of action.

the 22nd of May, 1848, the plaintiff, her brother Abraham being dead, caused to be served, by her attorney, upon the defendants, the following notice of action: - To John Riley, David Andrew, &c., inspectors of the township of New Accrington, in the county of Lancaster, acting under the provisions of the statute passed, &c., and to all other persons whom it may concern. Whereas you, the inspectors above named, or some of you, did, on or about the 2nd day of February last, cause to be seized and distrained, and afterwards sold and disposed of, a certain pack-cart on broad wheels, the property of Abraham Pilkington and Ellen Pilkington, as and for a certain rate and assessment, under the said act of Parliament, for lighting, &c., in respect of lands in the occupation of Abraham Pilkington and Ellen Pilkington, in New Accrington aforesaid, the validity of which rate is objected to, and the legality of the proceedings taken by you disputed. I do therefore hereby, as the attorney for the said Abraham Pilkington and Ellen Pilkington, and in pursuance of the said statute, give you and each and every of you notice, that after twenty-one days from the date of service hereof an action at law will be commenced against you, some or one of you, for recovery of compensation in damages for such illegal service, seizure, and distraint, and for the value of the property so seized as aforesaid. Dated at, &c., the 20th of May, 1848. Yours, &c., R. HALSALL, Attorney for the said Abraham Pilkington and Ellen Pilkington.

On the part of the defendants two objections were taken to the sufficiency of the notice; first, that it related to an action of damages for seizing the plaintiff's goods, whereas the form of the action itself was trespass quare clausum fregit; and, secondly, that it was given in the names both of Abraham and Ellen Pilkington, whereas the former was dead at the period when it was given. The learned Judge being of opinion that the notice was bad for the reason first stated, directed the jury to find a verdict for the defendants.

PILKINGTON
v.
RILEY
and Others.

PILKINGTON
v.
RILEY
and Others.

Pashley now moved for a new trial on the ground of misdirection. The notice was valid. First, it is not necessary that it should disclose the nature of the action. question turns upon the words of the 3 & 4 Wm. 4, c. 90, By it, it is enacted, "that no action or suit shall be commenced against any person or persons for any thing done in pursuance of or under the authority of or colour of this act, until twenty-one days' notice has been given thereof in writing to the said inspectors, nor after sufficient satisfaction or tender thereof has been made to the party or parties aggrieved," &c.; and the defendant "in such actions or suits may plead the general issue, or (a) give this act and every special matter in evidence at any trial" "which shall be had thereupon." It would have been sufficient had it merely stated generally that it was the intention of the parties to bring an action for an improper distress made for the non payment of an illegal assessment. [Parke, B.—Should it not state in what Court the action is to be brought?] No such objection was taken at the trial. The 24 Geo. 2, c. 44, s. 1, which renders it necessary that notice of action should be given to justices of the peace, is much more stringent than the present, since it requires that it should state the cause of action; and yet in Sabin v. De Burgh (b), it was held that a statement of the form of action was unnecessary; and in Prickett v. Gratrex (c), that a notice that the complainant would cause a writ of summons to be sued out, was sufficient. [Parke, B.—I doubt very much whether notice of action does not import the form. It might be important that the parties should be made aware of the nature of the action to be brought against them. If it were trespass for breaking the house, as well as taking the goods, a tender of a greater amount of compensation would be necessary than for merely seizing the goods. There was a case before this Court some time since in which the matter was considered.] That was the case of Jacklin v. Fytche (d). There the question

⁽a) Sic.

⁽c) 8 Q. B. 1020.

⁽b) 2 Campb. 196.

⁽d) 14 M. & W. 381.

was not as to the form of the action, but as to whether the place where the trespass was committed, had been stated with sufficient certainty. But secondly, it was objected that the notice was given as for Abraham and Ellen Pilkington, and that Abraham was dead. Now the warrant of the justices directs that the goods of A. Pilkington should be seized; and tender of amends might have been made to the attorney. At any rate, the objection could not be taken under the plea of not guilty. By the 5 & 6 Vict. c. 97, s. 3, it is enacted, that "so much of any clause or provision in any act or acts, commonly called public, local, and personal, or local and personal, or in any act or acts of a local and personal nature, whereby any party or parties are entitled or permitted to plead the general issue only, and to give any special matter in evidence, without specially pleading, shall be and the same is hereby repealed." Now, the 3 & 4 Wm. 4, c. 90, is an act of the kind referred to. fact of its being printed among the public acts does not prove that it is a general act. It is essentially of a local nature; Richards v. Easto (a). [Parke, B.—It is clearly a Pollock, C. B.—It is as much a public act as public act. the Reform Bill.]

PILKINGTON
v.
RILEY
and Others.

1849.

Cur. adv. vult.

Pollock, C. B., now delivered the judgment of the Court.—This was a motion by Mr. Pashley for a new trial, on the ground of misdirection. The question turned upon the sufficiency of the notice of action. We are not entirely agreed as to the validity of a notice which does not include a notice of the particular kind of action to be brought; but we are all of opinion that a notice of action by two persons, the one being dead, is not good where the action is brought by one alone. The rule will, therefore, on that ground be refused.

Rule refused.

(a) 15 M. & W. 244; S. C. ante, vol. 3, p. 515.

1849.

STUTTON v. BAMENT.

The superior Courts will stay proceedings in actions for a sum less than 40s., when they might have been recovered in an inferior Court.

The practice of staying such actions has not been affected by the city of London Small Debts' Act, 10 & 11 Vict. c. 71.

LUSH had obtained a rule, calling upon the plaintiff to shew cause why, on payment of 1l. 4s., the amount for which the action was brought, without costs, all further proceedings should not be stayed, on the ground that he ought to have sued in the Sheriff's Court of the city of London. The affidavits in support of and against the rule disagreed, the one stating that the case came within the provisions of the 10 & 11 Vict. c. 71, (the act under which the Court was constituted), and the other alleging that the plaintiff resided more than twenty miles from the defendant.

The motion was made immediately after the filing of the declaration.

J. Brown now shewed cause. This application is pre-The question depends on the construction of the London Small Debts' Act, 10 & 11 Vict. c. 71. 112th section it is enacted, "that all actions and proceedings which, before the passing of this act, might have been brought in any of her Majesty's superior Courts of record, where the plaintiff dwells more than twenty miles from the defendant, or where any officer of the Court, holden under the provisions of this act, shall be a party, except in respect of any claim to any goods and chattels taken in execution of the process of the Court, or the proceeds or value thereof, may be brought and determined in any such superior Court at the election of the party suing or proceeding, as if this act had not been passed." By the 113th section it is provided, "that if any action shall be commenced after the passing of this act in any of her Majesty's superior Courts of record, for any cause other than those lastly hereinbefore specified, for which a plaint might have been entered in the Court holden under the provisions of this act, and a verdict shall be found for the plaintiff for a sum not more than twenty pounds, if the said action is founded

on contract, or less than five pounds if it be founded on tort, the said plaintiff shall have judgment to recover such sum only, and no costs; and if a verdict shall not be found for the plaintiff, the defendant shall be entitled to his costs as between attorney and client, unless in either case the Judge who shall try the cause shall certify on the back of the record that the action was fit to be brought in such superior Court." According to the language of these sections, a plaintiff is entitled to bring his action in a superior Court if he can obtain a certificate from the Judge who tried it, that it was a proper subject for the consideration of such a tribunal. But as the certificate could not be granted or refused before the verdict, the defendant should have abstained from making his application until the proceedings had arrived at that stage. [Platt, B.—The rule was obtained for the reasons stated in Tidd's Pract. 9th ed. p. 516, and quite irrespective of the act, viz., that "when the debt sued for appears on the face of the declaration, or is admitted by the plaintiff or his attorney, or is proved by the affidavit of the defendant to be under forty shillings, and the plaintiff may recover it in an inferior jurisdiction, the Courts on motion will stay the proceedings; it being below their dignity to proceed in such an action." That reason has been questioned, as it can never be beneath the dignity of the Court to do justice. [Pollock, C. B.—The rule to that effect has been clearly laid down by Lord Kenyon in Kennard v. Jones (a). The statute cannot by implication alter the jurisdiction of this Court.] The practice of interfering was founded on the Statute of Gloucester, 6 Edw. 1, c. 8, which provides, "that from thenceforth none shall have writs of trespass before justices, unless he swear by his faith that the goods taken away were worth 40s. at least." But it has been holden, that the fact that a plaintiff's debt is under that amount, is not pleadable in bar; Sandall v. Bennett (b). It has also been decided, that a claim for less

1849.

STUTION v.
BAMENT.

⁽a) 4 T. R. 495.

⁽b) 2 A. & E. 204; S. C. 4 N. & M. 89; 3 Dowl. 294.

STUTTON v.
BAMENT.

than 40s., which could not be recovered in a County Court, must be sued for in a superior Court; Welsh v. Troyte (a); Harwood v. Lester (b); Tubb v. Woodward (c). Besides, if the Statute of Gloucester is to apply, the motion should have been to stay the proceedings altogether. But further, the discretionary power claimed by the Court has been removed by the 112th section of the present act, as well as the General County Court Act. The words of the former statute are "all actions and proceedings, which before the passing of this act, might have been brought in any of her Majesty's superior Courts of record." This expression must be taken in reference to the earlier local act in force for the city of London, viz., 5 & 6 Wm. 4, c. 94. By that act plaintiffs were not prohibited from suing in the superior Courts, at their election. It must be taken, therefore, as clear, that under certain circumstances, a person may still bring his action in the superior Court.

Lush was not heard in support of the rule.

Pollock, C. B.—I am of opinion that this rule should be made absolute. We all concur in thinking that the action might have been brought in the Sheriff's Court of the city of London, and that the statute constituting and regulating that Court does not alter the practice of the superior Courts which formerly prevailed of staying proceedings. The case of *Kennard* v. *Jones* (d) is directly in point.

ROLFE, B.—The reason why the superior Courts have stayed proceedings in actions for a sum less than 40s. is, that if such actions were allowed to go on, persons might be induced to spend a large sum of money in litigating a matter not worth it. The superior Courts have always,

⁽a) 2 H. Bl. 29.

⁽c) 6 T. R. 175.

⁽b) 3 B. & P. 617.

⁽d) 4 T. R. 495.

therefore, interfered to stay proceedings in such cases, unless they were satisfied that there was no other Court in which the sum could be recovered. STUTTON v.
BAMENT.

PLATT, B., concurred.

Rule absolute.

M'GREGOR v. KEILEY.

A SSUMPSIT by the plaintiff for work done by him as In an action on an attorney and solicitor.

Plea, amongst others, that the plaintiff did not deliver to dict for the plaintiff on the defendant, or send by post, &c., a signed bill, &c.

Replication, that the plaintiff did deliver to the defendant of no signed bill delivered to the defendation to the defendation.

The case came on for trial before the Lord Chief Baron that proof of at the sittings after Trinity Term, 1848; when the plaintiff bill of costs by proved that he had delivered a bill of costs to the servant of the defendant, at his dwelling-house. On the part of the defendant defendant it was urged that this did not amount to evidence of a delivery of a bill to the defendant, according to the terms of the issue. The learned Judge, however, directed that a verdict should be found for the plaintiff, at the same time giving the defendant leave to move to enter a verdict for him on the above issue, if the Court should be of opinion that there had been an insufficient delivery.

Crowder having accordingly, during last Michaelmas Term, obtained a rule nisi,

Martin and Willes now shewed cause. There was sufficient evidence to support the issue. The delivery to the servant afforded strong presumptive proof that it was delivered to the master. In the case of a notice to quit, a delivery to the servant of the tenant has been considered

In an action on an attorney's bill, after verdict for the plaintiff on an issue joined of no signed bill delivered to the defendant: Held, that proof of delivery of a bill of costs by an attorney to the servant of the defendant at his dwellinghouse, was sufficient.

1849.

M'GREGOR

E.

KEILEY.

sufficient; Doe d. Neville v. Dunbar (a); Jones d. Griffiths v. Marsh (b).

Crowder and Crompton, in support of the rule. The statute 6 & 7 Vict. c. 73, s. 37, enacts, "that no attorney," &c., "shall commence or maintain any action" "for the recovery of any fees," &c., "until the expiration of one month after" he "shall have delivered unto the party to be charged therewith, or sent by the post to, or left for him," &c., "at his" "dwelling-house," &c., "a bill of such fees, charges," &c. There was, therefore, no sufficient delivery. Proof of a personal service on the defendant was necessary to satisfy the issue. Hill v. Humphreys (c) is in point. There it was holden, that the delivery of an attorney's bill at the counting-house of his client, was not a good delivery within the 2 Geo. 2, c. 23.

Pollock, C. B.—I am of opinion that this rule should be discharged. We all think that there was sufficient evidence to go to the jury of a delivery of this bill of costs to the defendant.

PARKE, B.—I entertained at first a different opinion, but I now think that the plaintiff was entitled to select any mode of delivery. He may deliver it to the defendant himself, or, according to the construction put upon other acts, he may deliver it to an agent, who is authorized to receive it, or he may rely on having sent it by post, or on having left it at the dwelling-house or last place of abode of the defendant. When, however, he has chosen the medium of communication, he must prove it to the satisfaction of the jury. On the present issue, the plaintiff was bound to prove a delivery to the defendant. The evidence was that it had been left with a man servant, and the question is, whether the delivery to the servant may not be made use

⁽a) M. & M. 10.

⁽c) 2 B. & P. 343.

⁽b) 4 T. R. 464.

of as evidence of a delivery to the master. I think that it It is true that in adopting this course he runs the risk of the servant being called to prove that he did not communicate it. Nothing of the kind, however, was attempted here, and the verdict, therefore, should stand.

1849. M'GREGOR KEILEY.

ROLFE, B., and PLATT, B., concurred.

Rule discharged.

NUNN v. CLAXTON.

SCIRE FACIAS. The declaration was as follows:— A declaration Our Lady the Queen sent to the sheriff of the county of upon a judg-Middlesex her writ close in these words. Victoria, by the ment recovered Grace of God, of the United Kingdom of Great Britain public officer and Ireland Queen, Defender of the Faith, to the Sheriff company, of Middlesex, Greeting. Whereas Henry William Nunn, 7 Geo. 4, lately, that is to say, on the 30th day of March, A.D. 1848, c. 46, s. 13, in our Court, before the Barons of our Exchequer, at the act in one Westminster, under and by virtue of the statute in such "statute," and case made and provided, by the judgment of the same in others as the a statutes." Court, recovered against Benjamin Mew, one of the public It also deofficers for the time being of and for certain persons united defendant as in copartnership, for the purpose of carrying on, and car- "now" being a member of rying on the trade and business of bankers in England, the said coaccording to the statutes in such case made and provided, by and under the name, style, and firm, of the Isle of murrer, that Wight Joint Stock Banking Company; and which said the declaration B. Mew, before and at the time of the commencement of the reference that suit, had been, and at the time of the giving of the was surplusage, said judgment still was, such public officer as aforesaid, duly registered in that behalf, pursuant to, and according to defendant was the force, form, and effect of the said statutes, and was sued in that action as the nominal defendant, for and on behalf of the said copartnership, according to the force,

against the partnership. Held, on

to the statute and the description of the NUNN
v.
CLAXTON.

form, and effect of the said statutes, as well a certain debt of 28,000l., as also 8l. 15s., which, in our said Court, were adjudged to the said Henry William Nunn for his damages, &c., whereof the said Benjamin Mew, as such public officer as aforesaid, is convicted, as by inspecting the Rolls of our said Exchequer appears to us. And whereas, on behalf of the said Henry William Nunn, in our same Court we are informed, that although judgment has been so as aforesaid given, yet execution of the debt and damages aforesaid still remains to be made; and on behalf of the said Henry William Nunn, in our same Court, we are further informed, that Thomas Claxton now is a member of the said copart-Wherefore the said H. W. Nunn hath hereby besought us to provide him a proper remedy in this behalf, according to the form of the statutes in such case made and And we, being willing that what is just in this behalf should be done, command you that, by honest and lawful men of your bailiwick, you make known to the said T. Claxton, that he be before the Barons of our said Exchequer, at Westminster, to shew if he hath or knoweth of anything to say for himself, why the said H. W. Nunn ought not to have execution, according to the form of the statutes in such case made and provided, against him the said T. Claxton, so being such member of the said copartnership for the time being as aforesaid, as is alleged, for the debt and damages aforesaid, with interest, &c., according to the force, form, and effect of the said recovery and of the said statutes; if it shall seem expedient for the said H. W. Nunn so to do: and in what manner you shall execute this our writ, make appear to the said Barons at Westminster, on the said 3rd day of May, A.D. 1848, and have you there the names of those by whom you shall so make known to him the said T. Claxton; and to this writ, witness, &c. On which day comes, &c. And thereupon the said H. W. Nunn prays execution, according to the force, form, and effect of the said recovery, and of the statutes in such case made and provided, to be adjudged to him.

Special demurrer, assigning for causes, amongst others, that the declaration does not allege positively that the defendant was a member of the copartnership at the time when the judgment was recovered, and also at the time when the writ of scire facias was issued: that the declaration alleges, that the said "H. W. Nunn hath besought us to provide him a proper remedy in this behalf, according to the form of the statutes in such case made and provided, and the defendant is called upon to state if he knoweth of anything why Nunn should not have execution against him, according to the form of the statutes;" and that the word "statutes," in the plural, is repeated several times, and the "said statutes," used where there is no word to which "said" can be referred, one statute only having been previously referred to.

Joinder in demurrer.

Willes (H. Hill with him), in support of the demurrer. The declaration is bad on two grounds: first, it does not disclose on which statute the plaintiff is proceeding. In addition to the 7 Geo. 4, c. 46, there are now several acts which have reference to joint stock companies. The 1 & 2 Vict. c. 96; 3 & 4 Vict. c. 111, and 7 & 8 Vict. c. 113, are all of this description. By the 13th section of the latter, a different remedy than scire facias is given, viz., that by motion to the Court or application to a Judge. It should have been shewn, therefore, on which of these acts it was the intention of the plaintiff to rely. The Court cannot conclude, from the employment of certain expressions, that it was under the 7 Geo. 4, c. 46.

But, secondly, it is not shewn with certainty that the defendant was a member of the company against which execution issued. The allegation, "now is," is insufficient. The words of the statute should have been followed, and the defendant described as a member "for the time being." These writs issue during the Vacation as well as the Term, and it is possible that the present may have been issued in

NUNN v. CLAXTON.

NUNN
b.
CLAXTON.

the Vacation, and tested of the previous Term, and the defendant may not have been a member at the period when it was sued out. [Parke, B.—I think that the expression used is quite sufficient to satisfy the words of the statute.]

Crompton (Maynard with him), in support of the declaration. It is impossible that the defendant could have been misled by the use of the word "statutes," in the plural. The declaration states, that a previous judgment had been obtained against the public officer; and the clear inference, therefore, is, that it is under 7 Geo. 4, c. 46, the plaintiff The word "statutes," is surplusage, and is proceeding. may be rejected. But, supposing even that that be not so, it is not ground of demurrer. It is a mere form of entering the writ on the record. [Parke, B., referred to the case of The Earl of Claricarde v. Stokes (a), where a declaration by a common informer, on the stat. 5 Ann. c. 14, stating that the defendant kept a snare to kill game, against the form of the statute in such case made and provided, by reason whereof, and by force of the statute in such case made, &c., an action hath accrued, &c.; was held to be sufficient; for the statute first mentioned referred to the 5 Ann. c. 14, creating the offence and giving the penalty, and that last mentioned referred to the 2 Geo. 2, c. 19, whereby the whole penalty was given to the common informer, the half only of which had been given to him by an intervening statute.] If the defendant had considered himself at all affected by the ambiguity, he should have applied to a Judge at Chambers to strike out that which was surplusage; Alderson v. Johnson (b). [Parke, B.—These averments are mere surplusage. It is not like the case of a proceeding under a penal law, where the offence must be averred to be against the statute.] As to the second objection, the allegation of "now is," is quite sufficient. If the defendant had ceased to be a member before the writ was sued out, that fact should have

(a) 7 East, 516.

(b) 2 M. & W. 70; S. C. 5 Dowl. 294.

been pleaded. Where, under the old system of pleading, there was a plea of tender, and a replication of latitat sued out before the tender, the defendant was always allowed to rejoin, stating the time when the latitat was really issued; 3 Chit. on Plead. 1224, 5th ed.

Nunn 5. Claxton.

Willes, in reply. The first objection to the declaration is not that the plaintiff was bound, as in an action for the infringement of some penal act, to aver that it was contrary to the statute, but that he does not shew with sufficient certainty that he comes within any statute which would entitle him to the use of the process he is employing. As to the second objection, no answer has been given. Here the right claimed is founded on statute, and before the plaintiff can take advantage of it, he must prove that he is within the provisions of the enactment by which it is conferred.

PARKE, B.—I am of opinion that our judgment must be for the plaintiff. The word "statute," in the present case, may be rejected as surplusage. The title of a statute need not be stated. The Court is presumed to know what the titles are. We see here that the statute relied on must be the 7 Geo. 4, c. 46, s. 13. As to the second objection, I cannot perceive what other form could have been adopted. If the defendant had ceased to be a member of the company before the issuing of the writ, that fact should have been taken advantage of by plea.

POLLOCK, C. B., ROLFE, B., and PLATT, B. concurred.

Judgment for the Plaintiff.

VOL. VI. TT D. & L.

1849.

HALDANE v. BEAUCLERK.

The defendant having obtained a rule for a special jury, and had the jury nominated and reduced. a day was fixed for trial. When the appointed day arrived, it was found that no special jury process had been carried in: the cause was accord... ingly tried by a common jury as undefended. and a verdict given for the plaintiff. The Court set aside the verdict as irregular.

 $oldsymbol{T.}$ JONES had obtained a rule, calling upon the plaintiff to shew cause why the trial of this cause, and all subsequent proceedings, should not be set aside for irregularity, with costs. The affidavit stated that the defendant's attorney having, on the 4th of November, 1848, obtained a rule for a special jury, served it on the plaintiff's attorney, and on the sheriff, on the 6th. The special jury was afterwards nominated and reduced; and the cause was fixed for trial on the 8th of December. No special jury process had been carried in. On or about the 8th of December, the cause was tried by a common jury, as undefended, and a verdict found for the plaintiff. Rolfe, B., on being applied to at Chambers, directed proceedings to be stayed to enable an application to be made to the Court.

Martin and E. James shewed cause (a). The plaintiff was entitled to try the cause by a common jury. -The case of Holt v. Meddowcroft (b) is against you. There a common jury and special jury panel had been returned together, and no special jurymen appearing, the cause was tried by a common jury, and the verdict was afterwards set The practice is, either that the rule for the special jury must be discharged, or that a special jury must try the cause.] In Archer v. Bamford (c), Lord Tenterden ruled, that a cause which had been made a special jury cause, but in which no special jury had been summoned, should be tried by a common jury at the end of the day on which it would have been tried by a special jury, and he would not allow it to remain till all the special juries on the list had been gone through. [Parke, B.—How can you get over the

⁽a) In Hilary Term last.

⁽c) 1 C. & P. 64; S. C. 3 Stark.

⁽b) 4 M. & S. 467.

words of the 6 Geo. 4, c. 50, s. 30, which are, "and every jury so struck shall be the jury returned for the trial of such issue;" and an express decision against you?] In that case the special jury had been returned, and they were, therefore, to try the cause. The language of the section of the act referred to, is merely directory to the sheriff. [Parke, B.— It is difficult to overcome the construction put on Holt v. Meddowcroft, on the 3 Geo. 2, c. 25, s. 15, which is similar in its terms to the statute under which the present point arises. The only question is, whether, if the party, in whose favour the special jury is granted, does not take the necessary steps to obtain it, he is not to be presumed to have abandoned his right.] If the language of Lord Ellenborough, in Holt v. Meddowcroft, be carefully examined, it will be found that such was his opinion. The defendant has no right, by his negligence and omissions, to impose delay and expense on the plaintiff. In all the cases in which the verdict has been set aside, the rule for the special jury had been obtained by the plaintiff.

HALDANE V. BEAUCLERE.

T. Jones, in support of the rule. Unless the Court are prepared to depart from the usual practice, this rule must be made absolute. Hague v. Hall (a) is in point. There the plaintiff had obtained a rule for a special jury; on the arrival of the day appointed for trial, it was found that a special jury had not been summoned; the cause was accordingly put in the common jury list, and, on the following day, tried as an undefended action. The Court held this proceeding to be irregular, and set aside the verdict, with costs. That case, as well as Holt v. Meddowcroft (b), was decided on the ground that the words of the statute were imperative. If a party applies for a special jury merely for the purpose of delay, the proper course is to move for a

⁽a) Ante, vol. 1, p. 83; S. C. 6 Scott, N. R. 705; 5 M. & G. 693.

⁽b) 4 M. & S. 467.

HALDANE

BEAUCIERE.

rule to shew cause why the cause should not be tried in its order; Bush v. Pring (a). In Dunn v. Cox (b), the Court intimated an opinion, that "the right of the subject to try a case by special jury can only be touched by affidavit." Though the jury was at the instance of the defendant, the plaintiff was bound to summon it; Lush Pract., p. 477; Impey Pract., Q. B. p. 311, 10th ed.; Tidd Pract., p. 793, 9th ed. [Martin referred to 1 Clait. Archb. p. 349, 8th ed., as laying down the opposite rule, viz., that if a defendant has not summoned the special jurors in time, the cause would be tried as a common jury.] That statement only means this, that if a defendant be guilty of delay, the plaintiff would be allowed the opportunity of trying the cause by a common jury.

Cur. adv. vult.

Pollock, C. B., now delivered the judgment of the Court.—This was a motion to set aside the verdict, on the ground that the cause had been tried by a common jury, a special jury having been moved for, struck, and reduced.

We have made inquiries of all the officers who were likely to throw any light on the subject, and we find that their opinion is favourable to the defendant. We have also an express decision in one case, and the Lord Chief Justice of the Common Pleas, who has had great experience, has communicated to us that he has acted on this view oftener than once in the Court over which he presides. We have adopted his view; and although I was always much struck with the decision before Lord *Tenterden*, yet I must say that I do not think that it is sustainable, either according to the authorities on the point, or the express provisions of the act of Parliament. If the jury be not struck and reduced, then the case does not come within the statute; but the act having expressly declared that the jury so struck shall

be the jury to try the cause, we consider that we are bound by its language, and in deciding that the rule should be made absolute, we are only walking in the path of authority, and complying with the literal directions of the Legislature.

1849. HALDANE Beauclerk.

It is not without regret that we have found ourselves compelled to arrive at this conclusion; because it will undoubtedly afford the means by which a defendant, by moving for a special jury, and getting it struck and reduced, and omitting to have it summoned, may impose on the opposite party the expense of summoning, and possibly, that of paying the special jury; and defendants, in undefended causes, will thereby be armed with still stronger weapons than hitherto, by means of which to make terms which are contrary to justice. We cannot, however, resist the language of the statute, and the rule must, therefore, be made absolute.

Rule absolute.

NESS v. ANGAS.

SCIRE FACIAS on a judgment recovered against the Execution public officer of the North of England Joint Stock Banking upon a judg-ment recovered Company, under the 7 Geo. 4, c. 46, s. 13, to have exe-against the cution against the defendant, as a member for the time of a joint stock Plea, that the defendant was not a member of the pany, sued as company, modo et formâ. Issue thereon.

public officer banking comsuch, cannot be issued against a person, as a member for

the time being, unless he legally fill that character; and it is not enough that he did acts by which he held himself out to the world as a member.

By a deed of settlement constituting a joint stock company, it was provided that the husband of a female shareholder should not be a member of the company in respect of such shares, but should be at liberty to become a member on taking certain steps specified in the deed. should be at hearty to become a member on taking certain steps spectrated in the deed. The married woman, with her own separate property, and with her husband's consent, purchased shares in her own name in the above company. She was registered as a shareholder, and returned as such to the Stamp Office. The defendant, her husband, received some of the dividends, for which he gave a receipt as her agent; and attended meetings which only shareholders. were permitted to attend. He did not, however, take the steps required by the deed of settlement for investing himself with the character of a shareholder.

Held, that execution could not be sued out against him upon a sci. fa. as a member of the company for the time being, under the 7 Geo. 4, c. 46, s. 13.

NESS v.
ANGAS.

The case came on for trial before Cresswell, J., at the last summer assizes for Northumberland, when the following evidence was given. The deed by which the company was constituted was put in. It provided, among other things, that the company should be composed of those persons by whom it then was executed, and of all those who should subsequently become members; that all shares in the concern should be considered as personal property, without benefit of survivorship. The 28th clause provided, that the husband of any female shareholder should not be a member of the company in respect of such shares; but should be at liberty to sell the shares, or, at his option, to become a member, on his complying with the provisions thereinafter contained. The 29th clause provided, that the husband of any shareholder desirous of becoming a member of the company, in respect of the shares vested in him in such capacity, should give notice in writing at the banking house of the company, of such his desire, specifying the shares in respect of which he claimed to be a member; and thereupon, and upon otherwise complying with the provisions of the deed of settlement, he should become a member in respect of such shares, and have the same transferred into his name accordingly, and be personally charged with the duties and liabilities attached to the proprietorship. By the 30th clause, the husband of a female shareholder, who should not elect to become a member, was declared to be entitled to all dividends which had become due before his title accrued, but not to any dividends becoming due subsequently; and by the 31st clause, all persons in whom any shares should vest by marriage, &c., were required to execute the deed of settlement within six months after notice in writing for that purpose, otherwise their shares would become forfeited. appeared that the wife of the defendant, being entitled to an annuity settled to her own and separate use, independent of the control of her husband, had, with his consent and in her own name, purchased several shares in the above bank;

that she had been registered as a shareholder, and had been returned as such in the schedule furnished to the Stamp Office according to the provisions of the 4th section of the act. The defendant had received some of the dividends, and had signed a receipt for them in the following form:—

NESS v. Angas.

"MARY ANGAS.

Per procurationem,

H. L. ANGAS."

He had also been present at some of the meetings of the company, which none but shareholders were permitted to attend. He had not however taken any steps for becoming a member of the company, according to the provisions of the deed of settlement.

Upon this evidence the learned Judge, being of opinion that the defendant was a shareholder, directed the jury to find a verdict for the plaintiff; at the same time reserving leave to the defendant to move to enter a nonsuit, if the Court should consider that he was not a member of the company within the meaning of the 13th section of the act.

Knowles having obtained a rule accordingly,

W. H. Watson and Manisty now shewed cause. The defendant is clearly liable as a partner. The shares were originally purchased by his wife, but with his assent; and he has since adopted her act. Nor does the return of her name to the Stamp Office, as a shareholder, affect the question; since those returns are not the sole or conclusive evidence of the facts stated in them; Edwards v. Buchanan (a). Personal property acquired by the wife during coverture becomes that of the husband, if he chooses to claim it; Co. Litt. 300 a; Macqueen on Husband and Wife, p. 18; Philliskirk v. Pluckwell (b); Tugman v. Hopkins (c); Agar

⁽a) 3 B. & Ad. 788.

⁽c) 4 M. & G. 389; S. C.

⁽b) 2 M. & S. 393.

NESS v. Angas.

v. Blethyn (a); Carne v. Brice (b). So too a contract, made with the wife, is a contract effected with the husband, of which he may take advantage, or, if he has assented to it, on which he may be sued; Stevenson v. Hardie (c); Bidgood v. Way (d). There is also ample evidence of his being a shareholder. He has attended the meetings, and taken a part in the business of the company, and received dividends; and such acts have been held to be sufficient to fix upon a party the liability of a shareholder; Harrison v. Heathorn(e); Goddard v. Hodges (f); The Birmingham, Bristol, and Thames Junction Railway Company v. Locke (g); The Sheffield and Manchester Railway Company v. Woodcock (h); The London Grand Junction Railway Company v. Freeman (i). It is said that the Winding-up Act (11 & 12 Vict. c. 45) has reference to this matter; and the cases of Ex parte Angas (k), and Ex parte Fenwick (l), have been relied on: but in both of them the question mooted was, not as to the liability of shareholders to creditors, but as to their rights inter se; and those cases may, therefore, be clearly distinguished from the present.

Knowles and Granger, in support of the rule. It is not disputed that a party, by the performance of certain acts, may render himself liable as a shareholder. Here, however, the plaintiff is endeavouring to enforce a statutory remedy, which differs considerably from that given by the common law; and the act which confers it must be strictly construed. The question therefore is, not whether the defendant has held himself out to the world as a partner; but whether he has actually made himself a member of the company by

```
(a) 2 C., M. & R. 699.
```

⁽b) 7 M. & W. 183; S. C. 8 Dowl, 884.

⁽c) 2 W. Bl. 872.

⁽d) Id. 1236.

⁽e) 6 M. & G. 81; S. C. 6 Scott, N. R. 735.

⁽f) 1 C. & M. 33.

⁽g) 1 Q. B. 256.

⁽h) 7 M. & W. 574.

⁽i) 2 M. & G. 606; S. C. 2 Scott, N. R. 705.

⁽k) Hilary Term, 1849. Before Vice Chanc. Knight Bruce.

⁽¹⁾ Hilary Vacation, 1849. Before Vice Chanc. Knight Bruce.

compliance with the provisions of the deed of settlement. By the terms of that instrument, no person can become a member without the assent of the other members, and without going through certain forms therein specified. The husband of a female shareholder must give notice of his intention to take up her shares, and have them transferred, and he must also execute the deed of settlement. Neither of these acts has the defendant performed. He may have received the dividends; but he has done so merely as agent. [They cited also Dowling v. Maguire (a); Steward v. Greaves (b); Scott v. Berkeley (c).]

NESS v. Angas.

POLLOCK, C. B.—I am of opinion that this rule should be made absolute. This is a scire facias against the defendant, to charge him as a member of the company at the time when execution issued. To this there is a pleadenying the allegation of his being a member; and I think that, for the present purpose, he cannot be so considered. The facts proved at the trial were; that the wife had, out of her separate property, in her own name, purchased several shares; and that the proceeding was sanctioned by the husband, who subsequently received the dividends, and attended the meetings of the shareholders of the company. The plaintiff's counsel have argued that the wife having, with her husband's consent, bought shares with her own money, and those shares being, in point of law, the property of her husband, he, in effect, became a shareholder. That might have been so, if the case had been that of a creditor seeking to enforce his claim at common law; but the question here is, whether the plaintiff can, under the circumstances of this case, avail himself, as against the defendant, of the extraordinary powers conferred by the stat. 7 Geo. 4, c. 46. Now, considering that it is a great departure from the common law, I think that the correct course is, looking strictly at the statute, to ascertain what it has provided.

⁽a) Lloyd & Goold's Rep. 2 Dowl. 485, N. S. (Irish) 1. (c) 3 C. B. 925.

⁽b) 10 M. & W. 711; S. C.

NESS v. Angas.

It seems to me that we ought not to say that a person who might be sued as a shareholder because he had, by his conduct, held himself out as such, should be also, for the same conduct, considered as a member of the company for the purpose of entitling a creditor to issue a scire facias against him. It has been urged, indeed, that such a decision might tend to deprive a party of his remedy. Such a result, however, is not at all likely to follow. If a person has held himself out as a shareholder, he may be sued as such; but if you seek to avail yourself of this statute, you must shew that the case comes strictly within it. common law, where judgment is recovered against one of several partners, that judgment cannot be enforced against the other partners. Under this statute, however, judgment obtained against one may be enforced against his copartners; and great advantages having been thus conferred upon the party obtaining such judgment, we ought to construe the act with the greatest strictness, and only allow its operation, where its provisions have been carefully complied with.

ROLFE, B.—I am of the same opinion. The question turns entirely on the point, whether the defendant, at the time when the scire facias issued, was a "member" of the corporation within the meaning of the act of Parliament. Now what is the meaning of the word "member?" Is it to be understood as used of a person who is strictly a member? or of one who, by his conduct, has led others to believe that he is so? I think that the former interpretation must be adopted; and that therefore the rules, relative to individuals holding themselves out as members, have no application to the present case. There the law proceeds on the principle, that a person, who has represented himself, by his acts, to the world as occupying a particular character, shall not be permitted to turn round and say-I did not fill that character. Now how does this rule apply to this case? It is not pretended that the defendant is to be charged as a member of the company at

1849.

NE88

ANGAS.

the time of the plaintiff's becoming a creditor; but that, for some acts done by him after that time, although he is not in fact a shareholder, he is to be held liable as such under this enactment. He certainly does not fill the legal character of a member. No person can become a member without complying with the provisions contained in the Among others, there is one that a certain deed shall be executed, under penalty of the forfeiture of the shares. Now, as a married woman cannot execute a deed, her shares might be forfeited accordingly; but that does not make the husband liable, unless he complies with the A great deal of ingenious argument has been used as to whether the husband had become entitled to the fruits of the partnership; but granting that he might enjoy those benefits, it does not follow that he is subject to liability as a member. He can only be liable on the scire facias by being a "member" at the time that execution issued. make him that, he must be shewn to have been one of those persons who are members inter se; that he cannot be unless he executes the deed and complies with certain provisions, which he has not done.

PLATT, B., concurred.

Rule absolute.

Horn et Ux. v. Thornborough.

RESPASS for breaking and entering the plaintiff's A person who dwelling-house, assaulting his wife, and compelling her to to be arrested go to a police office.

under the 7 & 8 Geo. 4, c. 30, bonà fide and

reasonably believing that he is authorized so to do, is entitled to notice of action under sect. 41.

The question of bona fides is one for the jury.

The defendant, who was the reversioner of certain premises, of which the plaintiff had a lease, and who had taken forcible possession of them for rent in arrear, gave the plaintiff's wife into custody under the 7 & 8 Geo. 4, c. 30, s. 24, for maliciously breaking four window panes.

No notice of action had been given, nor was the question of bona fides left to the jury: Held, that if the defendant reasonably believed that he was acting in pursuance of the statute, he was

entitled to notice of action under sect. 41, and that the question of bona adds should have been submitted to the jury.

HORN
v.
THORNBOROUGH.

Plea, not guilty by statute.

The case came on for trial before Platt, B., at the Middlesex sittings in Michaelmas Term last, when the following evidence was given.-At the time when the alleged trespass was committed, the plaintiff occupied, and carried on his business of a jeweller, in premises in Leigh Street, of which he had a lease for seven, fourteen, or twenty-one years, whereof nine had expired. The reversion expectant upon the determination of the lease had been purchased by the defendant. On the 27th of April, 1848, the plaintiff being in prison for debt, and a quarter's rent being in arrear, the defendant forcibly entered the plaintiff's house and left his son in possession. plaintiff's wife, who had been absent at the time of the entry, finding on her return that the defendant had taken possession, broke some of the panes of glass in the windows in order to effect an entrance. She was, thereupon, given into custody by the defendant, who preferred a charge against her at a Police Court, under the 7 & 8 Geo. 4, c. 30, s. 24, for maliciously breaking four panes of glass, which were his property. The complaint was dismissed by the magistrate, and the present action subsequently No notice of action had been given. learned Judge was of opinion that the defendant, being entitled only to the reversion of the premises in question, was not "the owner of the property injured" within the meaning of the 28th section of the 7 & 8 Geo. 4, c. 30 (the Malicious Trespass Act), and, therefore, was not entitled to notice of action; and he refused to leave it to the jury to say, whether the defendant had acted in the manner stated under a bonâ fide belief that he was entitled to do so under the Malicious Trespass Act. The jury found a verdict for the plaintiff, with 25L damages. Charnock having obtained a rule nisi in Michaelmas Term last for a new trial, on the ground of misdirection,

E. W. Cox now shewed cause. The learned Judge was

right in refusing to leave the question to the jury. The defendant being merely a reversioner of the premises, was not an "owner of the property injured" within the meaning of the 7 & 8 Geo. 4, c. 30, s. 28 (a), and, therefore, not entitled to the protection afforded under it. The question, consequently, of whether he acted bonâ fide or not did not and could not arise. Parrington v. Moore (b) is in point. There, the Court held, that a party who causes another to be arrested, under the belief that he is a trespasser, is not protected by the act.

Horn

Thorn

BOROUGH

Charnock and Barnard, in support of the rule. The defendant was clearly the owner of the property, and, therefore, within the meaning of the 28th section. But admitting even that he was not, still, having acted under a reasonable impression that he was justified in apprehending

(a) Sect. 24 enacts, "that if any person shall wilfully or maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or private nature, for which no remedy or punishment is hereinbefore provided, every such person being convicted thereof before a justice of the peace, shall forfeit and pay such sum of money as shall appear to the justice to be a reasonable compensation for the damage, injury, or spoil so committed, not exceeding the sum of 51.," &c.

Sect. 28. "And for the more effectual apprehension of all offenders against this act, be it enacted, that any person found committing any offence against this act, whether the same be punishable on indictment or upon summary conviction, may be immediately apprehended, without

a warrant by any peace officer or the owner of the property injured, or his servant, or any person authorized by him, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law."

Sect. 41 provides, that "for the protection of persons acting in the execution of this act," "all actions and prosecutions to be commenced against any person for anything done in pursuance of this act, shall be laid and tried in the county where the fact was committed, and shall be commenced within six calendar months after the fact committed. and not otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action," &c.

(b) 2 Exch. 223.

HORN
THORNBOROUGH.

the plaintiff, he was entitled to notice of action. Cowmeadow (a) shews that if a defendant has acted under a bonâ fide belief that the case falls within the statute, he is entitled to notice of action under sect. 41; and that, in default of such notice, the jury on the trial may properly be directed to find for him, if they consider that he has acted bonâ fide. [Parke, B., referred to the case of Hughes v. Buckland (b).] Hazeldine v. Grove (c), and Wedge v. Berkeley (d) are also favourable to the defendant. [Parke, B.—Rudd v. Scott (e) seems to be exactly similar to the There, the defendant had caused the plainpresent case. tiff to be arrested and brought before a magistrate, on the charge of fraudulently disposing of the materials of a house belonging to him. The charge having been dismissed, an action for false imprisonment was brought; and it was held that the defendant was within the protection of the sect. 75, if he bonâ fide thought that he was acting in pursuance of the statute.] They referred also to Kine v. Evershed (f).

PARKE, B.—I am of opinion that this rule must be made absolute. The defendant would be entitled to notice of action, if he bonâ fide considered that there were sufficient grounds to authorize him to have the plaintiff taken into custody. That is established by Hughes v. Buchland. In that case, the servants of one P. had apprehended the plaintiff, on the ground that he was illegally fishing within the limits of a fishery, the property of their master. The jury found that the place where the defendant was taken was not within the boundaries of P.'s fishery; but at the same time also found that the defendants had reasonably believed that it was. On a subsequent motion to enter a verdict for the plaintiff, the authorities were all carefully

⁽a) 6 A. & E. 661.

⁽d) 6 A. & E. 663; S. C. 1 N.

⁽b) Ante, vol. 3, p. 702; S. C.

[&]amp; P. 665.

¹⁵ M. & W. 346.

⁽e) 2 Scott, N. R. 631.

⁽c) 3 Q. B. 997; S. C. 3 G.

⁽f) 10 Q. B. 143.

[&]amp; D. 210.

considered, and the Court refused to disturb the verdict, on the ground that the statute afforded a protection, not merely to the owner, but to all those who honestly pursued its provisions. A similar doctrine is laid down in Rudd v. Scott. In Beechey v. Sides (a), Lord Tenterden said, "It has uniformly been held, that where a party bonâ fide believes or supposes he is acting in pursuance of an act of Parliament, he is within the protection of such a clause. The defendant here bonâ fide supposed, though erroneously, that he was acting in pursuance of the statute 7 & 8 Geo. 4, c. 30, and he caused the plaintiff to be taken into custody." Now these decisions are correct; for the benefit resulting from the statute would be much lessened, if its operation were confined to the cases of persons who are legally authorized to arrest. The only difficulty that occurs is that created by Parrington v. Moore (b). On a closer examination, however, that case will be found to be inapplicable. There, the question was, whether a defendant was justified in arresting a person who trespassed upon land, under a fair supposition that he had the right to commit the act complained of; and it was properly decided that he was not. We are, therefore, left to the former authorities; and according to those it is clear, that every person who bonâ fide considers that he is acting in pursuance of the statute is entitled to its protection.

ALDERSON, B.—I am of the same opinion. All persons who act bonâ fide are entitled to notice of action; and it would be ridiculous to contend that only those can claim the protection of the statute who are legally justified in the course which they have pursued. The intention of the Legislature was to shield honest ignorance.

ROLFE, B.—In Hughes v. Buckland (c) I am reported to

(a) 9 B. & C. 806; S. C. 4 M.

(b) 2 Exch. 223.

& R. 634.

(c) Ante, vol. 3, p. 702.

HORN
v.
THORNBOBOUGH.

HORN
v.
THORNBOROUGH.

have stated, that where a party bonâ fide and reasonably believed himself to be owner, he was then fully protected. Nor am I inclined now to differ from the views which I then expressed. The fact of a reasonable belief is an important circumstance to enable us to arrive at the conclusion of whether the act was bonâ fide or not. Here, if the defendant reasonably believed that he was the owner of the house, and that the plaintiff's wife was committing an injury to his property which would justify him in proceeding against her under the Malicious Trespass Act, he would be entitled to notice of action. The question, however, of bona fides was not left to the jury, and he must therefore, have a new trial, in order that it may be considered.

PLATT, B., concurred.

Rule absolute.

MERCY v. GALOT.

Debt for the use and occupation of lodgings.

migs.
The particulars of demand stated that the action was brought to recover the sum of 42L 8s. 10d., being the balance of an account of 64L 0s. 10d., and then proceeded to admit the payment of

DEBT for the use and occupation of furnished lodgings.
Plea, never indebted.

The case was tried before *Platt*, B., at the London Sittings for Michaelmas Term last. In the bill of particulars of the plaintiff's demand, the action was stated to have been brought to recover the sum of 42*L* 8s. 10d., being the balance of an account of 64*L* 0s. 10d. It then enumerated the various items, and continued as follows: "on account whereof the plaintiff admits she has received at various times sums of money, amounting to 21*l*. 12s." It appeared that the defendant had originally taken the

payment of 211. 12s. The defendant had originally taken the apartments from the plaintiff's husband, but had continued to occupy them for some time after his death as tenant to the widow: Held, that the plaintiff was not concluded by the admissions in the bill, but was entitled to show that a portion of the sum for which credit was given had been paid during her husband's lifetime.

apartments from the husband of the plaintiff; and, after his death, which occurred on the 15th of August, continued to occupy them as tenant to the widow. The plaintiff having failed in proving that a larger sum than 141. 3s. 6d. had accrued due since her husband's death, the defendant's counsel claimed to be entitled to the verdict, on the ground that it was more than covered by the 211. 12s., payment of which had been admitted in the particulars. Evidence was then offered to shew, that of that sum 21, 10s, had been paid during the lifetime of the husband, and 10% so recently since his death, that it could not have been in respect of a debt due to the plaintiff. The defendant objected to its reception, on the ground that the bill of particulars was conclusive, and that the plaintiff could not be permitted to explain or contradict it. The learned Judge, however, received the evidence, and directed a verdict to be found for the plaintiff for 141. 3s. 6d., reserving leave to the defendant to move to enter a verdict, or reduce the verdict for the plaintiff to 51. 1s. 6d., the difference between that sum and the amount actually paid.

A rule nisi having been obtained,

E. W. Cox now shewed cause. The evidence was clearly admissible. The admissions of payments contained in a bill of particulars are not conclusive evidence for all purposes against the party making them. The plaintiff was entitled to shew that some of the payments admitted by her referred to debts which were due to her husband. No authority can be cited in favour of the defendant, except Smethurst v. Taylor (a). There, however, the point was not decided, and the language of the Judges can only be considered as dicta. In Lamb v. Michlethwait (b), a contrary view was taken, the Court having allowed the plaintiff to explain the nature of an admission in his particulars.

VOL. VI.

u u

D. & 1.

MERCY V. GALOT.

⁽a) 12 M. & W. 545.

⁽b) 1 Q. B. 400; S. C. 1 G. & D. 136; 9 Dowl. 531.

MERCY

O.

GALOT.

O'Malley, in support of the rule. The bill of particulars must be considered as conclusive. To hold the contrary, would afford opportunities to a plaintiff to entrap the defendant. Smethurst v. Taylor (a) is clearly in point.

PARKE, B.—I am of opinion that this rule should be made absolute for reducing the verdict to the sum of 51. 1s. 6d. The plaintiff was entitled to explain the nature of the admissions of payment made in her bill of particulars. The evidence offered for that purpose shewed that of the 211 12s. for which credit had been given, 21 10s. had been paid in the lifetime of her husband, and that it therefore was not a payment in respect of the debt for which the plaintiff was entitled to recover; and 10L so recently after his death, that it was impossible also that it could have formed part of the demand. In Smethurst v. Taylor, no such explanation was given, and we thought there that the plaintiff was bound by the statements made in his particulars, not only that he had received the money, but received it from the defendant. As, therefore, the explanation shews that the amount actually admitted was only 91.2s., and as the plaintiff has only proved a debt for 141. 3s. 6d., the verdict must be reduced to 5l. 1s. 6d., which is the difference between those two sums.

ALDERSON, B., ROLFE, B., and PLATT, B., concurred.

Rule absolute to reduce the verdict to 51, 1s, 6d,

(a) 12 M. & W. 545.

1849.

Townsend and Another, Executors of J. Hooper, deceased, v. Deacon.

A SSUMPSIT by the plaintiffs as executors of J. Hooper, for money had and received to the use of the testator.

If a party be resident abroat the accruance of the testator.

Plea, that the cause of action did not accrue within six years next before the commencement of this suit.

Replication: that the cause of action accrued to the said J. Hooper before the 1st of June, A.D. 1833, and that at the time of the accruing of the said causes of action, and of each and every of them, he, the said J. Hooper, was beyond the seas, to wit, &c., and that the said J. Hooper did not ever, after the time of the accruing of the said causes of action, or any or either of them, return from beyond the seas, and that the said J. Hooper, at the time of the accruing of the said causes of action, and each and every of them, to wit, &c., and from thence until and on and during the 1st of June, A.D. 1833, and from thence until and at the time of his death, to wit, the day and year in that behalf aforesaid, was and continued to be beyond the seas, and not in the United Kingdom of Great Britain and Ireland, or in either of the Islands of Man, Guernsey, Jersey, Alderney and Sark, or in any island adjacent to any of them, being part of the dominions of the Sovereign of this kingdom; and the said J. Hooper did not at any time after the accruing of the said causes of action, or any or either of them, and did not on the said 1st of June, in the year of our Lord 1833, or at any time afterwards during his life, come or return into the said United Kingdom, or into either of the said other islands; and that the plaintiffs, at and after the time of the death of the said J. Hooper, were and thence hitherto have been in this realm, to wit, in London, and not beyond the seas, or at any place out of the said United Kingdom, and the said other islands; and that this action was commenced and taken by the plaintiffs

resident abroad at the accrual of a cause of action, and continue abroad until his death, his executors are entitled to sue for the debt within six years from the testator's death; although more than six years had elapsed between the period of the accruing of the cause of action and of the testator's death.

Semble, per Parke, B., that in such a case the Statute of Limitations does not bar the right of action of the executors, and that they may sue after any lapse of time.

TOWNSEND and Another v.
DEACON.

as such executor and executrix as aforesaid, within six years next after the death of the said J. Hooper.

Rejoinder: that at the time of the accruing of the causes of action to the testator, and for six years after, the testator was living beyond the seas, and was of sound mind, of full age, not non compos mentis or imprisoned, or an infant under the age of twenty-one years, and might have sued during all that time; and that during all that time and until his death he neglected to do so, and that the present action was commenced after the death of the testator, and after the time and limitation of six years as aforesaid had fully elapsed.

Demurrer and joinder in demurrer.

Willes, in support of the demurrer. The question raised by these pleadings is, whether, if a person be abroad at the accrual of a cause of action, and remain there till his death, and more than six years elapse between the accruing of the cause of action and the period of his death, the claim is barred by the statute. To hold that such would be the case, would be absurd. The decision of the point depends upon the construction put on the 21 Jac. 1, c. 16, s. 7. That section enacts, that "if any person or persons," &c., "shall be at the time of any such cause of action" "given or accrued" "within the age of twenty-one years, feme covert, non compos mentis, imprisoned or beyond the seas; that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited, after their coming to or being of full age, discovert, of sane memory, at large, and returned from beyond the seas, as other persons having no such impediment should have done." It may be contended, indeed, that the case of an executor is not noticed in the section, and that its provisions do not therefore apply to him. But the answer is, that it must be taken to be a casus omissus in the statute; so that either the common law right prevails, and there is no limitation at all against him,



or the statute does apply, and, by an equitable construction of it, he may sue within six years of the death of the testator. The return from beyond the seas is placed on the same footing as the case of a feme covert, or infant. In Leveux v. Berkeley (a) it was held, that a party resident abroad might bring his action without returning; and in Strithorst v. Græme (b), the Court decided that the statute could never begin to run against a foreigner as long as he remained out of the country, and that his executors might bring the action.

Townsend and Another v. Deacon.

Crompton, in support of the rejoinder. If an executor is not bound by the Statute of Limitations, he comes at least within those cases in which the Courts have held that the action must be brought within a reasonable time, which has been construed to be a year. According to either view, the defendant is entitled to succeed. The 3rd section applies to this case, for it provides that every action shall be brought within six years next after the accrual of the cause of such action, and not after; and the plaintiff cannot bring himself within the 7th section. He is entitled to sue only as executor, and an executor is not mentioned in the [Parke, B .- In Strithorst v. Græme, the Court decided, that if a foreigner never comes to England, he has always a right of action while he lives abroad, and a similar right accrues to his executors after his death. They seem to have considered that executors were not restrained by the statute at all.] By the 4th section it is provided, that "if in any the said actions or suits judgment be given for the plaintiff, and the same be reversed by error," &c., "in all such cases the party plaintiff, his heir, executors or administrators," "may commence a new action or suit from time to time, within a year after such judgment reversed," &c., "and not after." It has been held on the equitable construction of this section, that if an executor take out process within

⁽a) Ante, vol. 2, p. 31; S. C. 5 Q. B. 836.

⁽b) 3 Wils. 145; S. C. 2 W. Bl. 723.

Townsexp and Anuther c.
Deacox.

a year after the death of his testator, and the six years had not elapsed before his death, though they elapsed within that year, yet it would be sufficient to take the case out of the operation of the statute; Bull. N. P. 150. [Parke, B.—What do you say with respect to the case of an infant?] His executor would, in a similar way, have a right to bring the action within a year, or some reasonable time.

Willes, in reply. The fallacy in the reasoning on the other side lies in the assumption that where a man is invested with certain rights, his executors must be expressly named, in order to ensure to them the devolution of those rights. A man carries his executor within himself, which is not the case with the heir; Co. Litt. 209 b, 210 a. The rule respecting reasonable time is only applicable when a person dies during the pendency of an action which has become abated; Williams on Executors, 1602, 4th ed; Rhodes v. Smethurst (a).

POLLOCK, C. B.—I am of opinion that the plaintiff is entitled to judgment. Here is a man who dies abroad having a right of action: it is allowed, that if he had returned to this country, he would have been at liberty to sue at any time within six years after his return: but it is contended, that by his death abroad, his executors, who have commenced the action within six years, must lose all There is nothing in the statute to warrant so ridiculous a consequence. It is said that the cases shew that under particular circumstances, an executor must sue within a reasonable time, which has been defined to be a year. There is nothing in the act, as far as I have been able to discover, about a year, or reasonable time. But further, we possess an express authority on the point in the case of Strithorst v. Grame (b). There it is laid down, that if a plaintiff is a foreigner and does not come to England in fifty years, he still has six years after his coming into

England to bring his action, and, if he never comes to England himself, he has always a right of action while he lives abroad, and so have his executors or administrators after his death. That is as applicable to an Englishman who goes abroad before the cause of action accrues, as to foreigners who never come here at all. But executors are the representatives of their testator: whatever rights he possessed they become entitled to. Now, if the testator had returned, he might have brought this action; and I think, therefore, that his representatives have a perfect right to do so likewise. It is unnecessary to discuss the question whether the executor could bring an action after the six years had expired: it will be sufficient to consider that point when it arises.

PARKE, B.—I am entirely of the same opinion. The 7th section extends the time for bringing actions to all persons who are infants, feme coverts, beyond the seas, &c., provided they bring the same within the time limited after their coming of age, becoming discovert, or returning from beyond the seas. Now, it is perfectly clear that each of these persons might have brought his action within the respective times, and it follows, therefore, that his executors who represent the person of the testator, would be entitled to stand in the same position. The case of Strithorst v. Grame goes the length of deciding this question. The 7th section takes the cases out of the operation of the statute, unless the party return; if he returns, then the action must be brought within six years: if he does not, then there is no limitation, and it would be the same with It is not incumbent on us, however, to his executors. enter into the latter question, as it does not arise here.

With respect to the argument founded on the equitable construction put on the 4th section, those were cases in which an action had been already commenced, and a reasonable time was conceded to the executors for its continuance, by

analogy to the old proceedings of journeys accounts.

Townsend and Another

DEACON.

1849. TOWNSEND and Another DEACON.

There is a ROLFE, B.—I am of the same opinion. positive decision on which we may safely rest our judgment. The question, however, is not without difficulty, since the 7th clause says, that persons beyond the seas shall be at liberty to bring the same action within such times as are before limited, after their return. Now, strictly speaking, that in the present instance has never occurred; but if it is to be considered as clear that the party himself may bring the action, what is to become of the executor's action, if the testator never returns? My Brother Parke seems to consider that he may bring it at any time. The more reasonable view would be, in my opinion, to regard it as a right of action accruing to him, and to be brought within six years. That point, however, does not arise here.

PLATT, B., concurred.

Judgment for the Plaintiffs.

GREW v. HILL.

A declaration in case stated, that before, &c., the defendant was employed by certain persons, &c., to make a sewer in a thereupon theretofore, &c., the defendant kept and continued upon the said highway two

The declaration stated, that before and at the time of the committing of the grievances thereinafter mentioned, the defendant was employed by certain persons acting as commissioners of sewers, to make and form a certain sewer in and along a certain common and public highway: and highway, to wit, a highway called the Cambridge Road. And thereupon theretofore, to wit, &c., the defendant kept and continued upon the said common and public highway two iron gratings (then lying on the said last mentioned

iron gratings, "then lying on the said last mentioned" "highway in the custody and care of the defendant, for the purpose of forming the said sewer," without placing any light or signal at or near such iron gratings, or adopting any other means to shew that they were then upon the said highway, whereby, &c. Plea, not guilty: *Held*, that the allegation that the gratings were "in the custody and care of the defendant," was not matter of inducement or material; and was, therefore, not admitted by the plea of not guilty.

common and public highway in the custody and care of the defendant, for the purpose of forming the said sewer), without placing any light or signal at or near such iron air gratings, or adopting any other means to shew or denote that the said iron air gratings were then upon the said highway; by reason whereof he, the plaintiff, in the night time of the day and year aforesaid, then walking upon and along the said highway, stumbled and fell over the said gratings into a pool of water lying near to and adjoining the said gratings; whereby he became, &c. Special damage.

Plea, not guilty.

At the trial before the Lord Chief Baron, at the Middlesex Sittings after Trinity Term, 1848, the following facts were proved. The defendant was a builder, and had entered into a contract to make a sewer on the Cambridge Road with the commissioners of sewers of the Tower Hamlets, who were to supply him with iron air gratings, to be inserted in holes pierced in the road communicating with such sewer. At the period of the occurrence of the accident, the gratings were standing against the kerb stone in the road, without any light having been placed near The defendant offered evidence to shew that the gratings were not in his custody. Its reception was, however, objected to by the counsel for the plaintiff, on the ground that that issue was not raised by the pleadings; the truth of the allegation having been admitted by the plea of not guilty. The learned Judge received the evidence, and asked the jury to say whether the gratings were in the custody and care of the defendant. The jury found that he had nothing to do with them; but that they had been delivered into his custody, and that he did not take care of them; and they returned a verdict for the plaintiff, with 51. damages. Leave was given to enter a nonsuit.

A rule nisi having been obtained,

W. H. Watson and W. L. Thomas shewed cause. The only plea placed on the record in this case was that of not

GREW

GREW

guilty. By adopting such a course, therefore, the defendant has precluded himself from shewing that he had not the custody and care of the gratings. By the Reg. Gen., Hil. Term, 4 Wm. 4, tit. "Pleadings in particular Actions," IV. In case,—it is provided, that "in actions on the case the plea of not guilty shall operate as a denial only of the breach of duty, or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the The breach of duty complained of here inducement." was the omission to place lights near the gratings, so as to warn the public. That alone, therefore, was put in issue. The custody and care of the gratings formed matter of inducement only. They constituted also a material allegation which might have been traversed, and which not having been traversed, was admitted to be true. v. Little (a) is a leading authority on this subject. There in an action on the case against the defendant for negligently driving his cart and horse against the horse of the plaintiff, it was held that he was not entitled, under the plea of not guilty, to shew that he was not the driver or the owner of the cart. In Hart v. Crowley (b) it was also determined, in an action for negligently driving by his servant of his waggon and horses against the plaintiff's carriage, that the defendant could not shew under not guilty that the servant and horses were not his. And a similar principle is established by the cases of Woolf v. Beard (c); Dawson v. Moore (d); Norton v. Scholefield (e). The inducement here has been so far incorrectly pleaded, that it has been inserted in the wrong place. That, however, is perfectly unimportant; Dunford v. Trattles (f). In that case Lord Abinger observes, "there is no reason, however, in principle why the inducement, as it is termed, should be at the be-

⁽a) 5 Bing. N. C. 678; S. C. 7 Scott, 796.

⁽b) 12 A. & E. 378.

⁽c) 8 C. & P. 373.

⁽d) 7 C. & P. 25.

⁽e) 9 M. & W. 665; S.C. 1 Dowl. 638, N. S.

⁽f) 12 M. & W. 529; S. C. ante, vol. 1, p. 554.

ginning of a declaration, rather than at the end." Lewis v Alcock (a) is also an authority to the same effect.

GREW
v.
Hill.

Petersdorff, in support of the rule. It must be taken that the jury have found that the gratings were not in the custody and care of the defendant. It is also submitted, that the defendant was clearly entitled under the plea of not guilty to give evidence of that fact. The breach of duty complained of was the keeping the gratings without a light near them. The averment of the gratings being under the defendant's care was unnecessary, and might be rejected as surplusage, without in any degree affecting the plaintiff's right to maintain his action. If, however, it be regarded as material, it can only be so on the ground that it forms part of the description of the wrongful act charged. Had a specific traverse been taken on it, it would have been holden to be bad on special demurrer. [He referred to Norton v. Scholefield.]

Pollock, C. B.—I am of opinion that the rule should be made absolute for entering a nonsuit. There is no doubt that Mr. Watson is quite correct in stating that whatever is matter of inducement and material, must, if not traversed, be considered as admitted. The form of the inducement, whether it commences with "whereas," "although," or "notwithstanding," is unimportant; and if the averment in this declaration that the gratings were "in the custody and care of the defendant" had been really matter of inducement, and material, his argument would have been conclusive, and the rule must have been discharged. allegation, however, as well as the statement of the employment of the defendant by the commissioners of sewers, was immaterial, and might have been omitted, without in any degree affecting the plaintiff's right to maintain his action. The neglect, therefore, to traverse it, was no admission of GREW

O.

HILL.

its truth. The rule is, that by omitting to traverse the facts contained in the declaration, those facts only are admitted which are necessary to support the action. The breach of duty put in issue here was the keeping the gratings without any light near them. And as the evidence adduced clearly shewed that the defendant had nothing at all to do with the gratings, the rule must be made absolute.

PARKE, B.—I am of the same opinion. The three principles contended for by the plaintiff's counsel are perfectly clear. First, that certain facts may be considered as inducement in whatever part of the declaration they may be found; secondly, that not guilty only puts in issue the breach of duty; and thirdly, that what is matter of inducement and material must, if not traversed, be taken as admitted. Its materiality is, however, essential. That was decided by this Court in the case of Bennion v. Davison (a), where it was held, that in an action of assumpsit for negligently carrying, the allegation of the defendant being the owner of the vessel was immaterial, and was, therefore, not admitted under a plea of non assumpsit. Here the averment that the gratings were "in the custody and care of the defendant," might have been struck out, and the declaration would still have been good. The material allegation to be answered was, that he kept the gratings on the highway without warning the public of their being there. Now, as the whole of the evidence went to shew that he had nothing to do with the gratings, the rule for entering the nonsuit must be made absolute.

ROLFE, B., and PLATT, B., concurred.

Rule absolute.

(a) 3 M. & W. 179.

1849.

TURNER and Others v. DEANE and Another.

A SSUMPSIT for money had and received, and on an Anattorney account stated.

Plea, non assumpserunt.

The cause was tried before Erle, J., at the Liverpool of a firm, have Summer Assizes, 1848, when the following evidence was by that mem-The defendants, who practised as solicitors at Liverpool, had acted as the professional advisers of the fessional busifirm of Barton, Irlam and Higginson. The firm was his private composed of two persons, Richard Deane and Jonathan no lien on them Higginson, the latter of whom resided at Liverpool, and for a debt due from the parthad the entire management of the affairs of the house at nership. The defendants had also been employed by Jonathan Higginson individually in the year 1846, to take up the title to the advowson of Bransby, in Yorkshire, and had, at his request, retained the deeds relating to it. the month of October, 1847, Barton, Irlam and Higginson having stopped payment, a joint and several fiat in bankruptcy was issued against them, under which the plaintiffs were appointed assignees. At that period the defendants had a claim of 116L 12s. against the partnership, and of 441. 6s. 2d. against Higginson, on his private account. Separate bills of costs had been regularly made out and The defendants, on being applied to for the title deeds in question, refused to give them up, claiming a lien on them for the respective sums of 116L 12s., and The plaintiffs thereupon paid both sums, the former under protest, and afterwards brought the present action for its recovery.

Upon this state of facts it was urged by the defendants' counsel, that they had a right of lien upon the deeds for the work done for the firm. The learned Judge, however, was of opinion that no such right could be claimed, and directed the jury to find a verdict for the plaintiffs; at the

with whom title deeds. the property of a member been deposited ness done on account, has

TURNER and Others
v.
DEANE and Another.

same time giving the defendants leave to move to enter a nonsuit, if the Court should consider that a lien existed in respect of the bill due for business transacted for the partnership.

A rule nisi having been accordingly obtained,

Martin and Crompton now shewed cause. No lien could be claimed in this case. General liens are not favoured by the law, and where they are relied on, they must be shewn to have been sanctioned by mercantile usage, as well as the A right to hold the goods of A. decisions of the Courts. for a joint debt due from A. and B., can be supported only by a special agreement; Chuck v. Freen (a). There it was holden, that a deposit of private deeds by one partner under a written agreement to secure payments made for him, will cover payments effected on behalf of the firm, if there be evidence that the deposit was really made in respect of the partnership debts. Here no such agreement was proved. Attorneys and bankers are entitled to set up a general lien; but only for the debts due from the persons whose property has come into their possession. The lien claimed must be co-extensive with the contract; Cowell v. Simpson (b). In that case Lord Eldon, in his judgment, says, "The practice with regard to the lien of an attorney upon papers is not very ancient. Lord Mansfield states that expressly, and that he had argued the question in the Court of Chancery; and Sir J. Burrow mentioned the first decision which established it in a Court of law by analogy to other cases of lien. Looking through the general doctrine of lien, as applicable to all cases except the purchase of an estate, with reference to which it has, in a series of decisions, been extended, it may be described as primâ facie a right accompanying the implied contract." In Ex parte Freen (c), the Vice Chancellor decided, that a security for a separate

⁽a) M. & M. 259.

⁽c) 2 Glyn & Jam. 246.

⁽b) 16 Ves. 280.

demand did not extend to a joint one; and in *In re Forshaw* (a), the same Judge ruled that a firm of three solicitors possessed no lien upon papers, which came for the first time into their possession, for costs due in respect of business done by it, when it consisted only of two members. Set-off, and lien, are correlative; and a person cannot have the one without being entitled to the other. But here there clearly could have been no set-off; *Brandao* v. *Barnett* (b); *Buchanan* v. *Findlay* (c).

TURNER and Others

DEANE and Another.

W. H. Watson and J. Henderson, in support of the rule. A right to a lien is a matter of law to be decided by the Court, and not a question of fact to be settled by a jury. The rules laid down relative to a banker's lien apply with even greater force to those of attorneys. Had the deeds in the present instance been deposited for a specific purpose, the question would have been different; but it having been general, the legal presumption is, that they were intended to be a security as well for the partnership as the private Suppose the existence of the converse case: that joint property had been deposited for the payment of a separate debt; surely a lien might be claimed. analogy attempted to be drawn between claims of set-off and lien, is fallacious; for a set-off is the creation of statutes. The particular point here raised is almost new; Lambert v. Buckmaster (d) approaches the nearest to it. There it was holden, that an attorney had a lien upon papers belonging to a bankrupt not only for business done, but for the costs of an action brought against the bankrupt subsequently to the issuing of the commission to recover the amount of the bill. It is very singular, that if this objection could have been taken, it should not have been then raised by two such experienced Judges as Lord Tenterden and Bayley, J. [Parke, B.—The rule did not

⁽a) 16 Sim. 121.

[&]amp; R. 593.

⁽b) 12 C. & F. 787.

⁽d) 2 B. & C. 616; S. C. 4 D.

⁽c) 9 B. & C. 738: S. C. 4 M. & R. 125.

TURNER and Others

DEANE

and Another.

admit of the point being raised.] [They referred also to Hollis v. Claridge (a), and Blunden v. Desart (b).]

PARKE, B.—I am of opinion that this rule should be discharged. The case gives rise to the abstract question, whether an individual who holds the deed of one person can retain it for a joint debt from that party and his Now, the determination of this question partners? depends upon authority. A general lien is not recognised by the law, except in the cases of bankers and attorneys. And, certainly, no authority can be met with any where to support the argument that a right of lien extends beyond the particular debts of the party himself whose goods are retained. If the case of Lambert v. Buckmaster (c) be examined, it will be found that the point could not arise. I therefore think, that in the absence of authority, we must decide that a party has no lien except for the debts of the individual whose property has come into his hands. Were we to adopt a different view, the inconvenience which would result would be extreme.

ALDERSON, B.—I am of the same opinion. This is a simple question of fact; for the law is clear, and no authority can be adduced to support the position contended for by the defendants. The duty was upon them to establish the existence of a lien in fact; and they have failed to do so.

ROLFE, B., concurred.

Rule discharged.

- (a) 4 Taunt. 807.
- (b) 2 Dru. & War. 405.
- (c) 2 B. & C. 616.

1849.

which entitles a mortgagor,

brought, on

payment of

well as all costs expended

law or in equity, to a

principal and interest, as

in any suit at

reconveyance of the lands,

and to the delivery of the

does not apply to cases where

the mortgagee is in posses-

sion, or has

attempted to exercise his

right of sale. Where,

therefore, a mortgagee.

under a power

contained in the mortgage

gagor's concurrence, at-

tempted to sell

the property, but unsucce

deed, had, with the mort-

title deeds,

SUTTON v. RAWLINGS (a).

PRIDEAUX had obtained a rule, calling on the The 7 Geo. 2, plaintiff to shew cause why he should not assign or reconvey certain land and a messuage comprised in a mortgage deed, and deliver up all deeds relating to the same.

The defendant had, on the 26th of May, 1845, mortgaged to the plaintiff the land and messuage to secure the repayment of 700L advanced by the plaintiff, and of the interest thereon, on the 26th of November in the same By the mortgage deed the defendant covenanted to repay the principal and interest on the 26th of November, and empowered the plaintiff to sell, in the event of default in payment within nine months after that day. On the 10th of July, 1846, the principal and interest remaining unpaid, the plaintiff, with the concurrence of the defendant, advertised the mortgaged premises for sale by auction, and on the 14th of July following, put them up for sale in pursuance of the advertisement, but failed to obtain a bidder. On the 7th of January, 1847, the plaintiff brought the present action on the defendant's covenant. 7th of April following, the proceedings in that action were stayed, on payment of the interest due on that day, and the costs of suit; the defendant's attorney undertaking to pay at the expiration of three months the amount of the principal, and the further interest which would then become due. The defendant's attorney did not perform his undertaking; but a Judge's order having been obtained on the 27th of July, 1847, requiring him to pay the principal and interest, and the costs of the application for such order within a week, he, on the 2nd of August, 1847, paid the principal, interest, and costs, exacting on that occasion

(a) This case was decided in Hilary Term, 1849.

payment of the costs of the abortive sale, of the execution of the reconveyance, and of shewing cause against the rule.

VOL. VI.

X X

fully, and had afterwards brought an action on the covenant, but which had been stayed on payment of the principal and nterest, the Court refused to compel him to reconvey and deliver up the title deeds. except on

D. & L.

SUTTON v.
RAWLINGS.

before he would pay the money, and as a condition of his making such payment, the following undertaking from the plaintiff's attorney.

Weston Super Mare, 2nd August, 1847.

SUTTON v. RAWLINGS.

Memorandum. The principal and interest due from the defendant up to this day, together with the premiums for insurance, have this day been paid to me as solicitor in the cause, and I hereby undertake that the plaintiff shall execute a transfer of the mortgage or reconveyance of the property, on payment of all costs he may have sustained as mortgagee, and the costs he may incur by reason of such transfer or reconveyance.

CHARLES B. CHALMERS.

On the 9th of August, 1848, the plaintiff executed the reconveyance, and by his attorney offered to deliver it to the defendant's attorney, on payment of the costs he had incurred as mortgagee, and by reason of the execution of the reconveyance. The defendant, by his attorney, refused to pay those costs, and now sought to obtain, under the 7 Geo. 2, c. 20, s. 1 (a), the deed of reconveyance, and the

(a) 7 Geo. 2, c. 20, s. 1, enacts, that where any action shall be brought on any bond for payment of the money secured by such mortgage or performance of the covenants therein contained, &c., if the person or persons having right to redeem such mortgaged lands, and who shall appear and become defendant or defendants in such action, shall pay unto such mortgagee, or in case of his refusal, shall bring into Court where such action shall be depending, all the principal moneys and interest due on such mortgage, and also all such costs as have been expended

in any suit at law or in equity upon such mortgage, the moneys so paid or brought into Court shall be taken to be in full satisfaction of such mortgage, &c., and the Court shall and may, by rule of Court, compel such mortgagee, at the costs and charges of such mortgagor, to assign, surrender, or reconvey such mortgaged land, and deliver up all deeds, evidences, and writings in his custody relating to the title of such mortgaged lands unto such mortgagor, &c., who shall have paid or brought such moneys into the Court, or to such persons as he shall appoint, &c.

other deeds mentioned in this rule, without reimbursing the plaintiff the costs incurred by him in the abortive attempt to sell, or the costs attendant on the reconveyance, contending that the costs which the Legislature by that statute required the mortgagor to pay, are the costs of the suit alone (a).

SUTTON v.
RAWLINGS.

Montague Smith shewed cause. The plaintiff is entitled, under the provisions of the 7 Geo. 2, c. 20, s. 1, to have the costs incurred by him in the abortive sale, as well as those attendant on the reconveyance, paid before he can be called upon to reconvey and deliver up the title This view is not affected by the case of Smeeton v. Collier (b). The point decided there had no reference to costs, but was merely that the words of the act, viz., "where any action shall be brought on any bond for payment of the money secured by such mortgage," were applicable to an action on the covenant for payment of money in a mortgage deed. The costs incurred here are of such a nature, that had the defendant gone into equity to redeem, he must have reimbursed them before he could have obtained a reconveyance. But further, by the agreement entered into with the plaintiff's attorney, the reconveyance of the property is to be effected on payment of all costs sustained by the plaintiff as mortgagee. By that instrument, therefore, a lien is given for costs. [He was then stopped by the Court, who called only

Prideaux, to support the rule. Unless the plaintiff can bring the case within the provisions of the 3rd section, by insisting by writing under his hand, or that of his attorney, "either that the party praying a redemption has not a right to redeem, or that the premises are chargeable with other or different principal sums than what appear on the

⁽a) The foregoing statement of facts is taken from the judgment.

⁽b) Ante, vol. 5, p. 184; S. C. 1 Exch. 457.

SUTTON v.

RAWLINGS.

face of the mortgage, or shall be admitted on the other side," it must be governed by those of the first. that section the defendant is entitled to a reconveyance and the title deeds, on payment of the costs of the suit alone. This is clear from the language employed. The words are, "if the person or persons having right to redeem such mortgaged lands," &c., "shall bring into Court where such action shall be depending all the principal moneys and interest due on such mortgage, and also all such costs as have been expended in any suit or suits at law or in equity upon such mortgage." They plainly shew that the costs referred to could not include costs of an abortive sale. The case of Doe d. Blagg v. Steel (a) is applicable. There it was held, that the defendant in an action of ejectment was entitled, on a forfeiture in not paying the mortgage money, to have proceedings stayed, upon payment of the principal and interest due on the mortgage deed, with the costs incurred at law and in equity, without paying any bygone interest, or the expense of preparing the mortgage deed, or any assignment of it. [Parke, B.—I have referred to my note of the case of Smeeton v. Collier (b), and I find that the point as to the costs was raised by Mr. Whitehurst. objection, however, that all the costs due had not been paid, was overruled; and the order of my Brother Platt upheld (c).

Cur. adv. vult.

were the costs of two abortive attempts at a sale, under a power in the mortgage deed; those of an action of ejectment to recover possession of the property; and those of certain replevin suits arising out of distresses put in by the mortgagee; and those of the negotiation for further time to redeem. *Platt*, B., had made an order for staying all proceedings in the action, on payment of the principal, interest, and costs

⁽a) 1 Dowl. 359.

⁽b) Ante, vol. 5, p. 184. S. C. 1 Exch. 457.

⁽c) Flood, who was counsel for the defendant in Smeeton v. Collier stated, that the mortgagees in that case had refused to deliver the mortgage deed and title deeds, on the ground, among others, that they had been put to great expense in the recovery of the mortgage money, which should be first paid. These expenses

[HILARY TERM,] 12 VICT.

The judgment of the Court was now delivered by Pollock, C. B.—Mr. Prideaux in the last Term obtained, on behalf of the defendant, a rule calling on the plaintiff to shew cause why he should not surrender certain land, and a messuage, and deliver up all deeds relating to them; in other words, why he should not reconvey premises which had been mortgaged to him, and deliver up to the mortgagor the muniments of the title to them. (His Lordship then stated the facts of the case as above set forth.) On the 9th of August, 1840, the plaintiff executed the reconveyance, and by his attorney offered to deliver it to the defendant's attorney, on payment of the costs he had incurred as mortgagee and by reason of this reconveyance. The defendant, by his attorney, refused to pay these costs, and seeks to obtain, under the 7 Geo. 2, c. 20, s. 1, the deed of reconveyance and other deeds mentioned in his rule, without reimbursing the plaintiff the costs incurred by him in the abortive attempt to sell, or his costs attendant on the reconveyance; contending that the costs which the Legislature by the statute required the mortgagee to pay, are the costs of this suit alone, and that as those costs have been paid, this rule must be made absolute in its terms. The argument in support of the position taken by the defendant is founded on the assumption that the first section applies to all cases in which proceedings at law have been adopted for the recovery of the principal and interest due on a mortgage deed. This assumption cannot be justified.

The Legislature intended to exonerate the mortgagor from the delay and expense of an equity suit to redeem; but not to deprive the mortgagee of any equity. To avoid such delay and expense, they authorized the Court of law in which the mortgagee should bring his action, to afford

of that action. This having been accordingly done, he made a subsequent order for the delivery to the mortgagor of the mortgage deed and other deeds, and which was afterwards confirmed by the Court, in the case as reported, ante, vol. 5, p. 184.

SUTTON 5. RAWLINGS. SUTTON v.
RAWLINGS.

relief upon a summary application; but they did not purpose to lessen the fine which in equity the mortgagor should pay him for the redemption of the hereditaments pledged. The absence of any provision applicable to the case of a mortgagee in possession, between whom and the mortgagor, in order to effectuate equity, an account should be taken, allowing rents and profits received by the mortgagee on the one side, the expense of repairing and maintaining the mortgaged property on the other, shews that with a due regard to equity, the remedy given by the first section could not in such a case be applied. In order, therefore, to preserve to the respective parties the equitable rights which the Legislature did not intend to impair, we think that the enactment has a more limited application than that contended for by the defendant's counsel, and that by reasonable construction, the true limitation of such application is to such cases as those in which it would be equitable to relieve on payment of the principal, interest, and costs of suit only: that is, in cases in which the mortgagee is not in possession, or in which he has not attempted to exercise his right of sale. The defendant's is not one of those cases. Unless, therefore, he will consent to pay the plaintiff's costs of the abortive sale, and of the execution of the reconveyance, and of shewing cause against this rule, his rule must be discharged, with costs.

Rule accordingly.

COURT OF COMMON PLEAS.

Easter Term.

IN THE TWELFTH YEAR OF THE REIGN OF VICTORIA.

SMITH and Another v. Troup.

BRAMWELL, in Hilary Term last, obtained a rule, The attorney calling upon the defendant to shew cause why he should on the record not pay the plaintiffs, or their attorney, the sums of 83L 17s., to refer the and 42l. 11s., pursuant to the award, the rule by which it had been made a rule of Court, and the allocatur of the Master.

It appeared from the affidavits in support of the rule, that theless refer the action had, after the declaration had been delivered, and validity of the before plea, been referred to arbitration by a Judge's order. cannot be The arbitrator by his award, dated the 1st of November, 1847, found that 831. 17s., were due from the defendant to against a rule the plaintiff, and awarded that the costs of the award should the award; be borne by the parties in equal shares. The order of that the client's reference was made a rule of Court on the 1st of December, only remedy and on the 17th, the costs of the plaintiff were taxed at attorney.

1849.

cause. If his client withdraw that authority from him, and the attorney neverthe cause, the reference disputed upon shewing cause for enforcing and, semble, is against his Although

the Court will not, generally, grant a rule to enforce an award under the 1 & 2 Vict. c. 110, s. 18, unless a demand be first made, of the sum awarded upon the party against whom the rule is applied for, by the party in whose favour the award was made, or by his legally appointed attorney; such demand will, under special circumstances, be dispensed with. SMITH and Another P. TROUP.

421. 11s.; which taxation was attended by the defendant's attorney. The plaintiff thereupon authorized one D., by power of attorney, to demand the amount; but the defendant kept out of the way, and it was only after several ineffectual attempts to serve him, that the award, the rule of Court, the Master's allocatur, and a demand for the sums in question, were ultimately served upon him, not by the plaintiff or by D., but by a clerk of D.

The defendant by his affidavit, in opposition to the rule, stated that he had never consented to the reference, or attended before the arbitrator; but that he had, on the contrary, always protested against the reference being proceeded with, and had, before the award was made, sent the arbitrator and the plaintiffs a notice of his protest. He also stated, that he had only authorized his attorney to attend the taxation for the purpose of protesting against it.

Montagu Chambers and Hawkins now shewed cause. The defendant's attorney consented to refer the cause, under the belief that he had authority to do so; but even if he had such authority, the defendant, by his protest against the arbitrator's proceeding in the matter, effectually revoked it; King v. Joseph (a); and the attendance of his attorney at the taxation before the Master cannot be taken as a recognition of the validity of the proceedings, as his attendance was only for the express purpose of protesting against them. [Wilde, C. J.—Can the attorney's authority to refer be disputed upon the present occasion?] It may be contended that there is no award in existence; and that is established by shewing that the award made is not valid. The plea of "no award," denies that there is any valid award; Dresser v. Stansfield (b); and, therefore, when a person is called upon to pay a sum of money in pursuance of an award, he may deny the existence of any award, and shew that there is none, by proving that the award relied

upon is invalid. Faviell v. Eastern Counties Railway Company (a), shews that upon the argument of a rule similar to the present one, the question, whether the arbitrator had jurisdiction, may be discussed upon affidavits. [Cresswell, J.—That case also shews, that an attorney, who is authorized to appear for a party in an action, has authority to refer the action.] If it be doubtful whether the award is valid, the Court will not grant this rule; Hawkins v. Benton (b). Another objection to the rule is, that it is not stated that the plaintiff paid the costs of the award, of which he now seeks to recover one-half from the defendant. [Wilde, C. J.—The fact that the Master has allowed the amount in taxation, is primâ facie evidence that they have been paid. Further, the money was not demanded either by the plaintiff or by the person whom he authorized by power of attorney; the demand is, therefore, insufficient; Hawkins v. Benton; Winwood v. Holt (c); Pearson v. Archbold (d).

Bramwell, contrà, was stopped by the Court.

Wilde, C. J.—This is an application under the 1 & 2 Vict. c. 110, s. 18, calling upon the defendant to pay a sum of money, in pursuance of an award, and the Master's allocatur; and the first objection to it is, that the defendant's attorney had no authority to refer the cause. The attorney on the record has, under ordinary circumstances, authority to refer the cause; but if in any particular case he exceeds his authority in referring, the remedy of the party is against his attorney. This objection, therefore, entirely fails. But, further, it seems to me, from the affidavits, that the defendant's attorney had, in this case, authority to refer; and, therefore, it is unnecessary to consider whether it was competent for the defendant, upon the present motion, to

```
(a) 2 Exch. 344. 14 M. & W. 197.
```

SMITH and Another v. TROUP.

⁽b) Ante, vol. 2, p. 465. (d) 11 M. & W. 108; S. C.

⁽c) Ante, vol. 3, p. 85; S. C. 2 Dowl. 769, N. S.

NMITH and Another s.

question the validity of the award if any excess of his attorney's authority had been satisfactorily shewn. It is next objected, that the same formalities, which must be observed before an attachment can be obtained, ought to have been observed before this rule can be granted, and that, in point of fact, they have not been complied with. The case of Hawkins v. Benton (a), however, is a decisive authority in favour of the plaintiff upon this point. Here, it appears that the defendant has kept out of the way, and has evaded, by every possible means, service of the demand; and the Court will not allow him to avail himself of his own wrongful acts. It is shewn also, that the plaintiffs have for several months hunted the defendant from place to place, and done all in their power to serve him; and, under these circumstances, I think that the strict rule, requiring a demand by the party personally, or his lawfully constituted agent, may be dispensed with. It is also said, that it does not appear that the plaintiffs paid the costs of the award; but the Master has allowed them on taxation, and there is no suggestion on the part of the defendant that the plaintiffs did not pay those costs. No sufficient cause has been shewn against this rule, and, I therefore think, it should be made absolute.

COLTMAN, J., CRESSWELL, J., and WILLIAMS, J., concurred.

Rule absolute.

(a) Ante, vol. 2, p. 465.

1849.

WOODHAMS v. NEWMAN.

DEBT for work, labour, and materials, goods sold and Where the delivered, money paid, and upon an account stated.

Pleas, first, except as to 181. 4s. 2d., parcel, &c., never indebted; secondly, except as aforesaid, a set-off; thirdly, as to 181. 4s. 2d., payment into Court.

Upon the trial before Maule, J., at the first sittings in Middlesex, in Easter Term, 1849, the plaintiff proved that set-off, the a sum of 84L was due to him, over and above the amount not entitled to paid into Court, and the defendant proved a set-off of 83L, all of which was admitted except one item. The jury found a verdict for the plaintiff for 20s., and the learned costs under Judge having refused to certify that the action was fit to Courts' Act. be brought in the superior Courts,

debt for which the plaintiff sues in the superior Courts exceeds 20L, but the amount is reduced below that sum by a enter a suggestion to deprive the plaintiff of the County

Rochfort Clarke, in the same Term obtained, on behalf of the defendant, a rule to enter a suggestion to deprive the plaintiff of costs.

Prentice now shewed cause. This case was not within the jurisdiction of the County Court. The 58th section of the 9 & 10 Vict. c. 95, enacts, "that all pleas of personal actions, where the debt or damage claimed is not more than 201, whether on balance of account or otherwise, may be holden in the County Court;" and the question is, whether the plaintiff's demand is a debt "on balance of account" within the meaning of this section. If the word "claimed" be understood as synonymous with "demanded," the case clearly does not fall within the section, for the amount "claimed" by the plaintiff considerably exceeded 201. If, on the other hand, the sum claimed must be understood to mean the sum recovered, still the case does not come within the jurisdiction of the County Court, because no account was ever come to between the parties, and the sum recovered cannot be considered as a debt "on balance of account." [Maule, J.—It will be contended on the other side, that

1849. WOODHAMS NEWMAN.

the plaintiff might have given the defendant credit for the amount of the set-off, and sued for the difference.] The plaintiff might not have known the amount of the set-off; and he had no means of ascertaining it. Besides, a defendant is not bound to plead his set-off; and, consequently, if a plaint had been brought in the County Court in this case, and the defendant had chosen not to plead the set-off, the plaintiff would have been under the necessity (by sect. 63) of electing whether he would be nonsuited, or whether he would abandon the excess of his debt above 201 he adopted the latter alternative, he would be without defence to an action which the defendant might bring for the amount which he had declined to set-off. of the Legislature was to confine the jurisdiction of the County Courts to cases where the cause of action did not exceed 201.; and to hold that this case falls within the jurisdiction of those Courts, would be in effect to hold that they have power to adjudicate upon demands of a much larger amount. For the process by which the result in this action was arrived at was, in fact, the trial of two distinct actions: one, the claim which the plaintiff had upon the defendant; the other, the claim which the latter had upon the former; and each of those claims much exceeded 201. It has always been held, that the jurisdiction of Courts of request did not extend to cases where the debt claimed was reduced by a set-off to an amount within their jurisdiction; 2 Chit. Archb. 1401, 8th ed.; Bailey v. Chitty (a); Jones v. Harris (b); Pitts v. Carpenter (c); Cottle v. Langman (d); Gross v. Fisher (e).

Rochfort Clarke, in support of the rule. It is not the sum demanded by the plaintiff in his plaint, but the sum actually recovered, that is the debt or damage "claimed;" Fairbrass v. Pettit (f); and although the cases referred to

```
(a) 2 M. & W. 28; S. C. 5
Dowl. 307.
```

⁽d) 9 Moore, 625.

⁽b) 1 Dowl. 374.

⁽e) 3 Wils. 48.

⁽f) Ante, vol. 1, p. 622; S. C.

⁽c) 2 Stra. 1191.

¹² M. & W. 453.

on the other side tend to establish an exception to that rule where the amount recovered is reduced by a set-off, it is to be observed, that they are all decisions upon the particular wording of the statutes establishing the Courts. The language of this statute, however, is not open to that construction; and it may have been the intention of the Legislature that, in a case of this kind, a practice should be adopted analogous to the course pursued in Laing v. Chatham (a), where, the plaintiff having proved the amount of his claim, and the defendant not having appeared to establish the set-off of which he had given notice, a conditional verdict was taken for the plaintiff for the whole of his demand, and a special indorsement was made upon the postea, under which the plaintiff might either take that sum, subject to be reduced on the defendant's entering into a rule to bring no action for the set-off, or take the difference between the full amount and the set-off; "after which," said Lord Ellenborough, "if the defendant should bring another action, the special indorsement on the postea would be a ground for the Court to stay proceedings in it." The 58th section gives the County Court jurisdiction where the debt does not exceed 201, "on balance of account or otherwise;" that is, where the debt is reduced within that limit, either upon a statement of account between the parties, or by any other mode of deduction, which would include a set-off. [Maule, J.—The words, "on balance of account or otherwise," mean much the same thing as "on balance of account, or not."

WILDE, C. J.—We are all of opinion that this case does not fall within the provisions of the County Courts' Act, and that, therefore, the proposed suggestion ought not to be entered upon the roll. The application is founded upon the 129th section, which enacts, "that if any action shall be commenced after the passing of this act in any of her

Woodhams 9. Newman.

(a) 1 Camp. 252; S. C. 1 Chit. 178, n.

WOODHAMS

b.

Newman.

Majesty's superior Courts of record, for any cause other than those lastly hereinbefore specified, for which a plaint might have been entered in any Court holden under this act, and a verdict shall be found for the plaintiff for a sum less than twenty pounds, if the said action is founded on contract, or less than five pounds if it be founded on tort, the said plaintiff shall have judgment to recover such sum only, and no costs; and if a verdict shall not be found for the plaintiff the defendant shall be entitled to his costs, as between attorney and client, unless in either case the Judge who shall try the cause shall certify on the back of the record that the action was fit to be brought in such superior Court." It is quite clear, therefore, that before a plaintiff is to be deprived of his costs by reason of his getting a verdict in the superior Courts for less than 201., it must appear that the matter, in respect of which the verdict was given, was one for which a plaint might have been entered in the County Courts. Was that the case here? In order to ascertain the meaning of this section, we may refer to other portions of the act which bear upon the question. 58th section, which relates to the jurisdiction of the County Courts, enacts, that where the debt claimed does not exceed 201, "on balance of account or otherwise," the proceeding is to be by plaint in the County Court; and it is said, that this is a case in which a plaint might have been entered in the County Court, because a debt reduced by a set-off, it is contended, comes within the meaning of the words, "on balance of account or otherwise." Looking, however, to the whole act, and to these two sections in particular, I think those words were meant to apply to cases where the parties have come to an actual account and struck a balance. or where there has been a payment upon the account. whatever be the meaning of the words, I do not think this is a case in which a plaint could have been entered in the County Court. It is plain that the act of Parliament was intended to give that Court jurisdiction in simple cases, where trial by jury might be dispensed with; otherwise it

is not easy to perceive any good reason for limiting the jurisdiction to a certain amount. But here the claim in dispute much exceeded that amount, and it might have involved questions of considerable nicety and importance. There was a set-off of upwards of 801, and the claim might have been made up of several items, each exceeding 20% In considering the proper mode of construing this act, we must have regard to the inconveniences to which any particular construction would tend, and give the Legislature credit for having anticipated them, and legislated so as to avoid them. If the plaintiff in this case had proceeded in the County Court, that Court must, in the first instance, have had to adjudicate upon and establish a claim exceeding that sum; and that being done, it would have had, in the next place, to consider the defendant's claim, in order to see whether the demand upon which it had adjudicated, was reduced by a set-off, and, in doing so, would have had to adjudicate upon another demand, also greatly exceeding 20% Thus, in order to decide this case, it would in reality have had to decide two actions, in each of which the amount in dispute exceeded the sum to which its jurisdiction extended. How is a plaintiff to proceed in levying his plaint? It is difficult to say. For, suppose he levies it for 201, if the defendant does not plead his set-off, the plaintiff cannot recover more than 201., and he must abandon the excess of his claim beyond that sum; if the set-off be pleaded, it will more than cover his demand, which is 201. If the plaint be for the whole amount, it shews, on the face of it, that the Court had no jurisdiction. He is also in the difficulty of not knowing, when he levies his plaint, whether the defendant intends relying upon a set-off, and, if he does, what is the amount or nature of the set-off; or whether the defendant does not prefer taking the opinion of a superior Court upon his set-off rather than of an inferior one, which the plaintiff cannot prevent him from doing. I do not see how, in such a case as the present, when he claims a large sum, which is liable to be reduced by a set-off, the plaintiff is to levy a

1849. Woodhams 8. Newmax. WOODHAMS
B.
NEWMAN.

plaint in the County Court. I, therefore, think that the case is not within either the words or the spirit of the act. It was never intended that the County Court should discuss adverse claims of unlimited amount, provided only the balance was ultimately reduced under 20L; and we ought to see clearly that a plaintiff has a remedy under the act before we deprive him of his costs. With respect to allowing the suggestion to be entered, and leaving it to the plaintiff to traverse it, this course would, no doubt, lead to a fuller inquiry; but, as the object of the act was to provide a cheap method of disposing of small claims, we ought not, by making this rule absolute upon a point about which we entertain no doubt, to give an opportunity of incurring further expenses, far exceeding the sum in dispute.

COLTMAN, J.—I think that the decisions upon the Courts of Request Acts, though founded upon the particular words of the acts, have a considerable bearing upon this case; because they furnish this general principle, applicable to all of a similar nature, viz.: that Courts which are established by the Legislature solely for the purpose of deciding small claims, shall not, under colour of adjudicating upon a small debt, in effect decide two separate actions, in each of which the sum in dispute far exceeds the amount to which their jurisdiction is limited. And I do not think that we are driven by the wording of this act to a decision at variance with that principle. The 58th section says, that the County Court shall have jurisdiction "where the debt or damage claimed is not more than 201.;" and although I agree that, in general, the amount "claimed" means the amount recovered, I do not think that is the construction to be put upon those words in cases like the present one, where the plaintiff must be taken to have established his claim to nearly 100%, subject only to be reduced by the defendant's proof of his counter-claim; and, therefore, the amount for which the plaintiff might sue, as well as the set-off for which he might be sued, far exceeding 201. If he had sued in the County Court he must have abandoned the excess of his claim beyond 201.; and there is no reason for saying that he ought to be compelled to do this. He clearly could not have sued for the whole amount in the County Court, and it is idle, therefore, to contend that he ought not to have sued in the superior Court.

WOODHAMS

NEWMAN.

MAULE, J.—I am of the same opinion. application under the 129th section of the 9 & 10 Vict. c. 95, to enter a suggestion upon the record to deprive the plaintiff of his costs, on the ground of his having brought an action in the superior Courts for a cause in respect of which he ought to have proceeded in the County Court; and the question is, whether this be a case in which a plaint might have been entered in the County Court. The meaning of the act is, that if the County Court could have decided the same question and have arrived at the same result as the superior Courts,—if it could have meted out to the plaintiff the same measure of justice and in no way prejudiced his claim,—then the plaintiff is to be deprived of his costs, because he has chosen to proceed in the more expensive tribunal. But it would be a practical absurdity, and it would convert the County Courts' Act, which was introduced for beneficial purposes, into an instrument of oppression, if we were to decide that a plaintiff, who cannot sue in the inferior Court, shall nevertheless be deprived of his costs if he sues in the superior one. The question then is, could the plaintiff have obtained the same measure of justice in the County Court as he has here? His demand against the defendant exceeds 201 If he levies a plaint in the County Court, he may describe his demand as under 201; but then he must abandon the residue of his claim. He cannot be certain that the defendant will set up his set-off, and he cannot, by giving the defendant credit, compel him to set it up. He may, therefore, lose the whole of his demand beyond 201. defendant, if he does not insist upon his set-off, may bring

WOODHAMS

v.

NEWMAN.

an action for it, and the plaintiff will not be able to avail himself of his own claim, for he has abandoned it, and cannot set it up again. I think, therefore, that the plaintiff could not have proceeded in the County Court without great prejudice to himself. The words "debt or damage claimed" in the 58th section must, I think, mean the amount found by the jury to be due to the plaintiff, and not the amount stated in the declaration. But that does not by any means apply to an amount arrived at by the deduction of a set-off; for in that case the jury finds that the plaintiff has a claim for such an amount, and that that amount is liable to be reduced by a sum which they find is due to the defendant. It was contended that the case came within the act, because the debt was, "on balance of account or otherwise," less than 201; but I do not think those words create any serious difficulty. They mean only that the mere fact that the debt once exceeded 20L shall not oust the jurisdiction of the County Court, if the amount has been reduced to less than 20% by a balance of accounts, or by other means, such as by payments. Here, however, the parties had not balanced their accounts, and the sum due to the plaintiff exceeded 201. Therefore the County Court had no jurisdiction; and to hold that it had, would be productive of the injustice pointed out by the Lord Chief Justice.

CRESSWELL, J.—I am entirely of the same opinion. I apprehend the meaning of the 58th section is, that when the debt or damage which the plaintiff is entitled to recover does not exceed 20l., a plaintiff cannot oust the jurisdiction of the County Court, simply by pretending that it does exceed that amount. But when he has a bonâ fide claim for more than 20l., the County Court has no jurisdiction. In the present case the debt due to the plaintiff was above 20l.; and it cannot be said that it was due "on balance of account," because there had been no balance of accounts between the parties, allowing the amount of the set-off. I quite agree that if parties meet together and strike a

1849.

WOODHAM

NEWMAN.

balance, and that balance is under 20L, the party to whom it is due must sue in the County Court. plaintiff's cause of action was altogether independent of the By the 63rd section he was prevented from splitting it; if he had proceeded in the County Court, he must have abandoned the whole of his claim beyond 201; and if he was afterwards sued for the amount of the set-off, he could not avail himself of that excess. Moreover he could not force the defendant to set up his counter claim,—the defendant himself could not set it up, if he did not give notice, under the 26th section, of his intention to do so,nor could the plaintiff give him credit for the amount at I therefore think that this case does not fall within the 129th section, and that the plaintiff is therefore entitled to his costs.

Rule discharged.

renie machariken

SARGENT v. GANNON.

DEBT for work and labour, money paid, and upon an A solicitor was emploin account stated.

Plea, that the work and labour was done, and the money of the Court paid, as the attorney and solicitor of the defendant, and that the account was stated in respect thereof, and that no 'Hancock s. Round.' Hand.' Holl to his clie

Replication, that the plaintiff did, pursuant to the statute, one calendar month before action, send to the defendant by post a bill inclosed in and accompanied by a letter subscribed by the plaintiff.

Upon the trial, before Williams, J., at the Middlesex number of items, none sittings in Easter Term, 1848, it appeared that the action of which spe-

was employed in a purchase under a decree of the Court in a cause of Round.' bill to his client was headed Yourself v. Round,' but indorsed ' Hancock v. Round,' and contained a number of items, none cifically referred by name

to the cause, or to the Court in which the business was done, but all appeared to be descriptive either of conveyancing business, or of business done in the Courts of the Lord Chancellor and Vice Chancellor, and the offices of the Accountant General and Masters.

Held, that by reasonable intendment, the names of the cause and of the Court in which the business was done, sufficiently appeared.

SARGENT B. GANNON. was brought to recover the amount of a bill of costs for business done by the plaintiff for the defendant, as an attorney and solicitor, in contracting for, in the first instance, and afterwards in endeavouring to rescind, the contract, for the purchase of some lands and hereditaments, under a decree of the Court of Chancery in a suit of Hancock v. Round. The bill of costs was not signed by the plaintiff, but was inclosed in a letter which was so signed. The form and principal items of the bill were as follows:

"E. M. Gannon, Esq., to R. Sargent, Yourself v. Round. "Trinity Term, 1845.

- "Attending you on your calling on me with particulars and conditions of sale under this decree; perusing and considering the same, as it was your intention to become the purchaser of Lot 1, if possible.
- "May 23. Attending you afterwards, when you stated you had purchased Lot 1, and instructed me to do what was necessary to complete the purchase. Attending accordingly at the Master's Office, bespeaking copy of Master's report, and attending for same.
- "May 31. Attending to file report, bespeaking office copy; instructions to counsel to move for order to confirm Master's report of purchase.
- "Attending Court; order made; copy and service of order on plaintiff's solicitors; the like on defendant's solicitors.
- "July 18. Instructions to counsel to move to make order absolute.
- "July 21. Attending Court; order made absolute; writing you, requesting a remittance of the purchase money to pay into the Bank.
- "July 28. Attending to draw up order absolute, confirming Master's report; instructions to counsel to move for leave that the Vice Chancellor Wigram may be applied to for an order to pay purchase money into Court; attending

Court; order made. Instructions to counsel to move Vice Chancellor Wigram for leave to pay money into Court, pursuant to order of Lord Chancellor; attending Court; order made.

SARGENT b. GANNON.

- "August 6. Writing defendant's solicitors, requesting them to send me abstract of title; attending and comparing abstract with original deeds.
- "August 14. Attending for order to pay in purchase money; attending to lodge office copy at Accountant General's Office; bespeaking ticket to pay in purchase money and interest; attending for same. Attending at the Bank of England, paying in, and taking receipts.
- "December 11. Attending counsel this day, when he advised that the title would be bad if certain parties did not join in the conveyance; attending you in conference with reference to counsel's opinion on the conveyance; attending at the Accountant General's doing the needful to prevent defendant's solicitors from taking money out of Court.

"Hilary Term, 1846.

"January 10. Many attendances upon you with reference to rescinding the contract, which you were desirous of doing, if possible, when I suggested the propriety of having a consultation with an eminent Queen's counsel, prior to taking any step for that purpose, and you expressed your approval of that course being adopted. Attending consultation, when Mr. J. P. considered that the vendors could not make a good title, and recommended that you should present a petition to have your purchase money paid out of Court. Instructions for petition; two fair copies for the Lord Chancellor.

"January 23. Attending Court at Westminster, when Mr. J. P. advised that the prayer of the petition should be amended, and leave of the Court was accordingly obtained for that purpose. Having been served with warrants to settle the conveyance before the Master, attending same, when the Master refused to interfere in the matter until

SARGENT v. GANNON. the petition had been disposed of; attending at Westminster to amend Vice Chancellor's copy petition.

- "February 14. Attending Court this day, when petition argued, and dismissed with costs.
- "February 28. Attending warrant to settle conveyance before the Master, when, after hearing solicitors on both sides, he took time to consider his judgment.

"March 14. Attending to bespeak copy of plaintiff's costs; afterwards for same."

On the back of the bill was written,

"E. M. Gannon, Esq.

"R. Sargent, 10, Norfolk Street, Strand."

It was objected on behalf of the defendant, that the bill was insufficient, as it did not shew in what Court and in what cause, the business it related to had been done. The jury found for the plaintiff, and leave was reserved to the defendant to move to enter a nonsuit.

Humfrey having obtained a rule accordingly,

Byles, Serjt., and Ball shewed cause. The 6 & 7 Vict. c. 73, does not in terms require that the name of the cause and of the Court in which the business was done should be stated; but it is admitted that the cases have established that those facts should appear upon the bill. In the present case, it is submitted, they do sufficiently appear. It is enough if they can be collected by reasonable intendment from the bill; Martindale v. Falkner (a). Here the indorsement points out that "Hancock v. Round" was the cause, and the several items shew that the Court of Chan-

(a) 2 C. B. 706; S. C. ante, vol. 3, p. 600.

cery was the Court, in which the business was done. There are some items which relate to conveyancing business; but those, like the other items, are, since the 6 & 7 Vict. c. 73, taxable in the Court of Chancery. *Ivimey* v. *Marks* (a) is altogether different from this case; for there the business appeared to have been done partly in Chancery and partly in the common law Courts, and the bill did not refer the items to the Courts in which they were respectively taxable.

SARGENT 5. GANNON.

Humfrey and H. S. Wilde, in support of the rule. not enough to shew that the bill sufficiently points out the Court in which some of the items are taxable; if it contain one item which does not appear to be referable to any particular Court for taxation, the bill is insufficient. "The Legislature intended," says Alderson, B., in Engleheart v. Moore (b), "that the client should be informed where each item of the business was done, and that the attorney should hold his hand for a month after the delivery of the bill, for the express purpose of giving the client a full opportunity of ascertaining whether the business was done, and whether the charges are reasonable. For this purpose it is very material that the bill should shew in what Court the business was done, because the fees are different in different Courts." Several of the items in this bill cannot be distinctly referred to any particular Court; they may be for business done in the Court of Bankruptcy (which has its own taxing officers), as well as in the Court of Chancery, and the bill is, therefore, insufficient.

COLTMAN, J. (c)—It appears well established that, in an attorney's bill, the name of the Court and of the cause in which the business was done, should appear. At the same time, I think that we ought to give a reasonable intend-

⁽a) 16 M. & W. 843; S. C. ante, vol. 4, p. 60.

ante, vol. 4, p. 709.

(b) 15 M. & W. 548, 552; S. C.

ante, vol. 4, p. 60.

(c) Wilde, C. J., was sitting in the Court of criminal appeal.

SARGENT

GANNON.

ment to the bill, and—although the act of Parliament was intended to give every fair advantage to the client-not to construe it with any unnecessary degree of strictness. It seems to me that this bill sufficiently shews that the business was done in the Court of Chancery. refer to business before the Lord Chancellor and one of the Vice Chancellors, and that is sufficient information to enable the defendant to make inquiries whether the business was done or not, and whether the charges are proper; for he must be taken to know that the Lord Chancellor and the Vice Chancellor are two of the great presiding officers of the Court of Chancery. If the bill had contained any items which might have been referred ad aliud examen; had it intimated, for example, that any of the business had been done in a Court of common law, that would have been a ground for holding the bill insufficient. But no business appears to have been done in any Court except the Court of Chancery; and I therefore think the bill sufficiently shews the name of the Court in which the business was With respect to the name of the cause, some difficulty arose from the words "Yourself v. Round" at the head of the bill; but I think that is sufficiently explained by the indorsement. On the whole, I am of opinion that this bill is sufficient.

MAULE, J., having been absent during part of the argument, declined giving any opinion.

WILLIAMS, J.—The bill is quite sufficient to shew a person, though he be not a lawyer, that the business was done in the Court of Chancery.

Rule discharged.

1849.

McLEAN v. PHILLIPS.

ASSUMPSIT, first, for goods sold and delivered; A defendant secondly, for work and labour; and thirdly, upon an incase of a account stated.

Plea to the whole declaration, payment into Court of entitled to his costs in the land, and no damages ultrà. Replication, damages ultrà.

There was no other plea. The plaintiff did not proceed to trial, and the defendant, in Hilary Term, 1849, obtained judgment as in case of a nonsuit. Upon taxation of costs, the Master allowed the plaintiff his full costs down to the payment of the money into Court, and allowed the defendant his full costs in all the subsequent proceedings.

Kingdon, in Hilary Term last, obtained a rule, calling upon the plaintiff to shew cause why the Master should not review his taxation of costs. He referred to Crosby v. Olorenshaw (a), and Postle v. Beckington (b).

Hance now shewed cause. The defendant in paying money into Court admitted that the plaintiff had a good cause of action against him; and it would be very hard upon the plaintiff if, after that admission, he were not to be paid his costs up to the time when the money was paid. Alderson, B., says, in Harrison v. Watt (c), "the policy of the new rules was to make each party pay costs in respect of those parts of the case in which he was wrong." Here the defendant, by paying money into Court, admitted that up to his doing so, he was wrong. [Williams, J.—He would have been entitled to his costs under the Reg. Gen., Hilary Term, 1 Vict., if he had accepted the money in full accord and satisfaction of his cause of action; but he did not do so. Cresswell, J.—The

A defendant obtaining judgment as in case of a nonsuit, is entitled to his costs in the cause, although his only plea was a plea of payment of money into Court.

⁽a) 2 M. & S. 335. (c) Ante, vol. 4, p. 519, 520,

⁽b) 6Taunt. 158; S.C. 1 Marsh, n. (a); S.C. 16 M. & W. 316. 510.

McLean v. Phillips. plea of payment into Court gives the plaintiff a conditional title to costs; but if he does not comply with the condition, is he entitled to his costs? If he had gone to trial and been nonsuited, would he have been entitled to costs?] is admitted he would not. But there was no trial in this case; the defendant obtained judgment as in case of a nonsuit. [Cresswell, J.-In the ordinary case of judgment as in case of a nonsuit, is not the defendant entitled to the same costs as upon an actual nonsuit? The cases of Seamour v. Bridge (a), and Lorck v. Wright (b), are in favour of the plaintiff. [Cresswell, J.-In those cases the defendant had not obtained judgment. There was no adverse decision against him. Wilde, C. J.—The defendant has obtained the like judgment as in case of a nonsuit; surely he is to be put into the same position as regards costs, as if he had been actually nonsuited.]

Kingdon, in support of the rule, was not called upon.

PER CURIAM.

Rule absolute.

(a) 8 T. R. 408.

(b) Id. 486.

Ross v. GANDELL.

During Term, the Court alone, and not a Judge at Chambers, has power to authorize the plaintiff to enter an appearance for the defendant after distringas. THIS was a rule, calling upon the plaintiff to shew cause why the writ of summons issued in this cause, the service thereof, and all subsequent proceedings, should not be set aside for irregularity.

It appeared from the affidavits in support of the rule, that the writ was issued on the 2nd of March, 1849, and

The omission of the name of the county in the description in the writ of summons of the defendant's residence, is merely an irregularity, which is waived, if not made the subject of an application within a reasonable time.

was directed to the defendant by the description of "John N. Gandell, of No. 3, Parliament Street, in the city of Westminster," without naming the county. effectual attempts were made to serve a copy of the writ on the 5th and 8th of March, at 3, Parliament Street, where the defendant had an office; on the 14th it was left at that place, and, on the 16th, one of the defendant's clerks stated, that it had been handed to his attorney. The defendant did not appear, and the plaintiff, on the 27th of March, obtained a distringas, to which the sheriff, on the 16th of April, returned non est inventus, and nulla bona. On the 24th of the same month, (in Easter Term), Maule, J., made an order at Chambers, giving the plaintiff leave to enter an appearance for the defendant, which was accordingly done on the following day; and on the 30th this rule was obtained.

Ross v. Gandell.

Fitzherbert, in the same Term, shewed cause. omission of the county in the writ of summons does not make the writ void. It is, indeed, an irregularity; but it is an irregularity of which advantage should have been taken within a reasonable time; Child v. Marsh (a). The general rule of Hilary Term, 2 Wm. 4, pt. L r. 33, directs, that "no application to set aside process or proceeding for irregularity shall be allowed, unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity;" and as the defendant must have had notice of the irregularity on the 16th of March, his application on the 30th of April cannot be deemed to have been made within a reasonable time, especially when regard is had to the fact, that the plaintiff has, in the interval, obtained a distringas, and entered an appearance for the defendant. The irregularity must, therefore, be considered as waived.

The only question then is, whether a Judge at Chambers has authority, during Term, to make an order to enter an appearance for the defendant. The books of practice do,

Ross v. Gandell.

indeed, state the rule to be that the application should be made to the Court during Term, and to a Judge at Chambers in Vacation; but it is submitted, that the language of the 2 Wm. 4, c. 39, s. 3, which confers this power upon the Court and Judges, does not bear out that distinction; and, in practice, the power has been constantly exercised by Judges at Chambers during Term. In Smeeton v. Collier (a), the Court of Exchequer held, that where a statute gave any power in general terms to the Courts, that power might be exercised by a Judge at Chambers as the delegate of the Court.

Ball, in support of the rule. The omission of the county rendered the writ a nullity; for it is not in the form prescribed by the 2 Wm. 4, c. 39, s. 1, which enacts, that "the place and county of the residence or supposed residence of the party defendant, or wherein the defendant shall be or shall be supposed to be, shall be mentioned" in the writ. "I think," said Tindal, C. J., in Richards v. Stuart (b), "that the more safe and convenient course, in the interpretation of this statute, is to give the writs the words and form prescribed by the Legislature. It will be more safe, because we shall then have to indulge in no conjectures; and it will be more convenient, as affording a precise and easy rule for all to follow, although some hardship may be sustained in the particular case." In that case the defendant was discharged out of custody, because the capias did not strictly follow the form given by the 2 Wm. 4, c. 39. "The statute," says Parke, J., in Smith v. Crump (c), "provides the form in which the summons is to be drawn, and if parties will not take the trouble of looking at the act before they proceed, they must take the consequences." In Child v. Marsh (d), the writ stated the name of a county, and was, therefore, correct in form; but the county named

⁽a) 1 Exch. 457; S. C. ante, vol. 5, p. 184. See Clarke v. The East India Company, ante, p. 278.

² Dowl. 752; 3 M. & Scott, 774.

⁽c) 1 Dowl. 519.

ast India Company, ante, p. 278. (d) 6 Dowl. 576; S. C. 3 M. (b) 10 Bing. 319, 320; S. C. & W. 433.

was not the right one, and the mistake was held an irregularity. That case, however, is not like the present one; for here no county whatever is named. [Street v. Lord Alvanley (a), and Partridge v. Wallbank (b), were also referred to.]

Ross F. Gandell.

Next, the Judge had no jurisdiction to order an appearance to be entered for the defendant. [He was then stopped by the Court.]

WILDE, C. J.—The words of the 3rd section of the 2 Wm. 4, c. 39, which give a power to grant a distringas, and those which give a power to authorize an appearance to be entered for the defendant are precisely the same. Their meaning is perfectly plain, viz.: that the Court is to have the power during Term, and a Judge at Chambers in Vacation only; and there is no good reason for giving them different constructions. It has never been the practice to grant writs of distringas at Chambers during Term; on the contrary, it has always been well understood that the Court alone exercises that power in Term. But it is said that Judges at Chambers have been in the habit of making orders during Term for entering an appearance after a distringas, and that the validity of such orders has never been questioned. The point may never, indeed, have been brought before the Court; but here it distinctly arises, and upon looking into the statute, we think that the words of the 3rd section are free from doubt, and that the Judge had no power to make the order for entering an appearance for the defendant. This rule must, therefore, be made absolute for setting aside that order, and the entry made in pursuance of it.

The objection to the writ fails, because it was not taken in time. The defect was merely an irregularity; and the rule of practice, as well as justice, requires that where a person has knowledge of an objection founded on irre-

⁽a) 1 Dowl. 638.

⁽b) 1 M. & W. 316; S. C. 5 Dowl. 93.

Ross Boss B. Gandell gularity, he shall make his application, to avail himself of such objection, within a reasonable time. Here he has not done so; but, on the contrary, given the plaintiff ample time to take a further step in the cause, viz., to obtain a distringas. The rule will, therefore, be made absolute of setting aside the order of *Maule*, J., and be discharged as to the residue.

CRESSWELL, J., and WILLIAMS, J., concurred.

Rule accordingly.

PRITCHETT v. SMART.

The 8th section of the Joint Stock Jobbing Act, imposes a penalty of 500% upon parties buying or selling stock of which the sellers are not possessed at the time of the contract; and the 9th enacts, that every broker shall keep a book of his transactions in the public stocks, and shall produce it "when thereunto law-fully required." Á broker

having, as indorsee of a

bill, brought

A SSUMPSIT by indorsee against acceptor of a bill of exchange, drawn by Richard Williams upon and accepted by the defendant, and indorsed by R. W. to the plaintiff.

The defendant, before pleading, made an application to Maule, J., at Chambers, similar to that now made to the Court; but his Lordship having refused it,

Byles, Serjt., now moved for a rule, calling upon the plaintiff to shew cause why he should not produce to the defendant his (the plaintiff's) book, called the Brokers' Book, pursuant to the 7 Geo. 2, c. 8, s. 9, which contains the entries of the contracts, agreements, and bargains relating to the public stocks, made between the plaintiff and R. W., (the drawer of the bill), and the days of making such contracts, agreements, and bargains, so far as the same relate to the sum or sums claimed thereon by the plaintiff from the said R. W. when he indorsed the said bill to the

an action upon an affidavit that the bill was believed to have been indorsed to plaintiff in payment of differences in respect of illegal agreements in stocks,—that the plaintiff should be ordered to produce his book for the defendant's inspection. The Court refused the rule, on the ground that the defendant had no interest in the book, and also that its production might expose the plaintiff to penalties.

plaintiff; and why the plaintiff should not shew the defendant such parts of the said book as contained such entries. The affidavit in support of the rule, which was sworn by the clerk of the defendant's attorney, stated that the deponent was informed and believed that the plaintiff was a sworn broker of the city of London, and that the bill sued upon was accepted by the defendant for the accommodation of the drawer, and indorsed by the drawer to the plaintiff, in payment of differences in respect of illegal agreements and bargains in stocks between the drawer and the plaintiff, while the latter was a sworn broker. The Stock Jobbing Act, (7 Geo. 2, c. 8), after imposing (sect. 8) a penalty of 500L upon parties buying or selling stock, of which the sellers are not actually possessed at the time of the contract, enacts, by sect. 9, "that all and every broker or brokers, or other person or persons who shall negociate or act as a broker, receiving brokerage in the buying, selling or otherwise disposing of any of the said public or joint stocks or other public securities, shall respectively keep a book or register, which shall be called the brokers' book; in which said book he and they shall fairly, justly and truly enter all contracts, agreements and bargains, that he or they shall from time to time make between any person or persons whatsoever on the day of the making such contract or agreement, together with the names of the principal parties, as well buyers as sellers, and also the day of making such contract or agreement, to the intent and purpose that such broker or brokers, and other person or persons acting or negociating as such as aforesaid, shall from time to time produce such book or register, when thereunto lawfully required." It is submitted, that the latter words sufficiently authorize the present application. Maule, J., in refusing it at Chambers, suggested that a bill of discovery was the only means by which the defendant could obtain the production of the book; but in Bullock v. Richardson (a), the Court of

PRITCHETT

U.
SMART.

PRITCHETT

b.
SMART.

Chancery refused to compel a discovery under the 5th and 8th sections of this act, as the defendant might be exposed to penalties. The only case at law upon this subject is Rawlings v. Hall (a), when the Court granted a rule nisi for a new trial, on the ground that the Judge had ruled at nisi prius that a broker was not bound, under a subpœna duces tecum, to produce his book at the trial. The terms of the statute distinctly require the plaintiff to produce it; and it is submitted, that a defendant to an action brought by him is entitled to the inspection of it for the purpose of framing his defence. It is for the Court to decide on what occasions the broker may be lawfully required to produce it. [Williams, J.—The nearest case to an application of this kind, is where the production of the Court rolls of a manor is asked for. Wilde, C. J.—There the party entitled to the production has an interest in them; here that is not so.]

WILDE, C. J.—Applications of this kind are generally made to the Court for the purpose of avoiding the necessity of filing a bill of discovery; but the defendant in this case calls for the intervention of the Court, on the ground that the statute authorizes it to order the production of the book. I think, however, that he has not laid a proper foundation for his application. The only affidavit upon which it is founded, is that of the clerk of the defendant's attorney, who says he believes that the plaintiff is a sworn broker of the city of London, and that the bill was accepted by the defendant for the accommodation of the drawer, and indorsed by him to the plaintiff in payment of differences in respect of illegal bargains in stocks between the drawer and the plaintiff, whilst the latter was a sworn broker. such slender grounds the Court will not act. My Brother Williams has referred to a class of cases where the Court interferes to compel a party in a suit to grant his opponent

an inspection of documents; but that is because the party applying for the inspection has an interest in the documents. In the same way, if two persons, in mutual confidence, sign an instrument which is left in the possession of one of them, and that person refuses to produce it to the other when called upon, a Court of equity would compel him to do so, and so will this Court. So, where a person holds papers as trustee for another, this Court will order their production. In all these cases, however, the party applying for the production has a direct interest in the document withheld; and there is no case in which the Court has interfered in favour of a person who had not such an interest. Here, the defendant says that he can impeach the bill sued upon, if he be allowed to inspect the plaintiff's book, and he asks that he may do so, although the book when produced will be evidence against the broker, and may subject him to penalties under an act of Parliament. In other words, he asks the Court to assist him in fishing for evidence. said, that the 9th section of the Stock Jobbing Act, obliges a broker to keep a book of all contracts, agreements, and bargains transacted by him, and to produce it when required. To whom is he to produce it? The statute does not say; but I apprehend that the intention was, that he should keep a book of his dealings and transactions, and produce it, when required, to his principals. The act never intended to trench upon the principles of the common law, and to oblige a person to produce evidence which renders him liable to heavy penalties. This is clear from sect. 4, which indemnifies from penalties a party answering a bill of discovery, which, under sect. 2, he is bound to answer. The section under which we are called upon to act, gives no indemnity; and it is, therefore, clear to my mind, that it never contemplated that a party would be exposed, under it, to all the inconveniences of a bill of discovery, upon a summary proceeding. As, therefore, the defendant has no interest in the book, and as he has not shewn that the

PRITCHETT

S.
SMART.

VOL. VI. Z Z D. & L.

PRITCHETT v. SMART.

statute entitles him to the production of it, I think this application must be refused.

COLTMAN, J.—I am of the same opinion. It appears to me that we must refuse this application, upon the same grounds as lead a Court of equity to decline compelling a party to answer a bill of discovery. It is admitted, that the Court of Chancery never interferes to compel a person, who is called upon to answer, to supply evidence tending to criminate himself; and if a bill in equity will not lie to compel the production of this book, surely this Court will not compel its production by a summary proceeding. It is argued, that as the act says that the broker shall produce his book when lawfully required, he is bound to produce it upon all occasions, and that the only mode of requiring it is by obtaining an order of the Court; but it has been held, that it must be produced upon a subpœna duces tecum; therefore an order is not indispensable.

CRESSWELL, J.—I am of the same opinion. The statute says, that the broker is to produce his book "when thereunto lawfully required," and it is said, that it is for the Court to decide upon what occasions he may be so required. Now, what is the occasion for its production here? The defendant does not shew that he is a partner, or that he is in any other way, or for any purpose whatever, interested in the book. The only ground upon which he founds his application is, that the book, if produced, may furnish him with the means of finding a good defence to the action. But can the Court, in any case, order a party to produce documents for the purpose of supplying a defence against himself? This is not like the case where the Court rolls of a manor are ordered to be produced; because there the party applying has an interest in them. From the case in Vesey (a), it clearly appears that the Court of Chancery

would not compel a discovery in this case; and it is equally clear that the same principle must govern us.

1849. PRITCHETT Smart.

WILLIAMS, J.—I agree with the rest of the Court. It is difficult to state upon what principle the Court exercises the jurisdiction which it has assumed in cases of this kind; but it seems, according to a case cited in Jevens v. Harridge (a), to have been exercised as early as in the time of James 1. In the present case, however, it is clear that even a Court of equity would not interfere, and I am not inclined to extend our jurisdiction.

Rule refused.

(a) 1 Wms. Saund. 9 d. 6th ed.

REED v. SHRUBSOLE.

TRESPASS for assaulting the plaintiff.

The defendant allowed judgment to go by default, and section of the County Courts' the jury having, upon a writ of inquiry issued to the sheriff Act, which of Kent, assessed the damages at 40s., the defendant, in plaintiff of pursuance of leave obtained for that purpose, entered a dict be found suggestion to deprive the plaintiff of costs under the for him for less than 20L To that suggestion the plaintiff in contract, or County Courts' Act. demurred.

Creasy, in support of the demurrer. The question is, whether a plaintiff can be deprived of his costs under the 9 & 10 Vict. c. 95, where the defendant suffers judgment where a deto go by default; and it is submitted that he cannot. The fered judgment 129th section enacts, that he shall have no costs if "a ver- by default, and dict be found for" him, in an action of tort, for less than 5L, a writ of inunless the Judge who tries the cause certifies. "verdict" clearly refers to a verdict at the trial, and not to at 40s.

The 129th deprives a 5L in tort, only applies to cases where a verdict has been found upon the trial of the cause.

Therefore. fendant sufthe jury upon The word the damages Wilde, C. J.,

Coltman, J., and Williams, J., (Cresswell, J., dissentiente,) upon demurrer to a suggestion entered by defendant to deprive plaintiff of costs, that the plaintiff was entitled to his costs.

1849. REED SHRUBSOLE.

the finding of a jury upon a writ of inquiry, because the section proceeds to except those cases in which "the Judge who shall try the cause" shall certify; and it has been held, that a sheriff has no power to certify that an action is a proper one to be brought in the superior Courts. Thus, in Wardroper v. Richardson (a), it was held, that the 43 Eliz. c. 6, s. 2, which authorizes "the Judges and Justices before whom" the cause shall be tried to certify to deprive the plaintiff of costs when he recovers less than 40s., did not extend to a trial before the sheriff, and that that officer, therefore, could not certify under the act. "The words 'Judges' and 'Justices' in the statute of Elizabeth," said Littledale, J., "cannot mean any but the Judges and Justices of the Courts at Westminster;" and Parke, J., observed, "It certainly was not intended by the 3 & 4 Wm. 4, c. 42, s. 17, to give the power of certifying to sheriffs and other Judges to whom causes were sent by writ There was once a clause in the bill to this effect, but it was struck out." So, it has been held, that the same statute did not extend to an assessment of damages under a writ of inquiry; Claridge v. Smith (b); Jones v. Bond (c). So, also, it is laid down in Bull. N. P. 329, that "on writs of inquiry in cases within this statute," (the 22 & 23 Car. 2, c. 9,)—which deprives a plaintiff of costs where he recovers less than 40s., unless the Judge at the trial of the cause shall certify upon the back of the record,—" the plaintiff shall have full costs, though he do not recover so much as 40s. damages." In Harris v. Lloyd (d), and Strutton v. Whitwell(e), it was held, that a suggestion to deprive the plaintiff of costs could not be entered under the Middlesex Court of Requests' Act (23 Geo. 2, c. 33), where the defendant had suffered judgment to go by default, and damages had been assessed under a writ of inquiry. [Dunster v. Day (f);

⁽a) 1 A. & E. 75, 6; S. C. 3 N. & M. 839.

Jones v. Barnes, 2 M. & W. 313. (d) 4 M. & S. 171.

⁽b) 4 Dowl. 583.

⁽e) 1 M. & R. 562.

⁽c) 5 Dowl. 455; S. C. nom.

⁽f) 8 East, 239.

Bale v. Hodgetts (a); Waller v. Deane (b); and Littlewood v. Smith (c), were also referred to.] It will be observed that the words in the 129th section of the 9 & 10 Vict. c. 95, "the Judge who shall try the cause," are very similar to those of the statutes of Elizabeth and Charles 2. When it has been the intention of the Legislature that the plaintiff should be deprived of costs, whether the damages were assessed at the trial or upon a writ of inquiry, apt words have been used to express that intention. 3 & 4 Vict. c. 24, which repealed the 22 & 23 Car. 2, deprives of costs a plaintiff who recovers less than 40s., whether the verdict shall be given "upon any issue or issues tried, or judgment shall have passed by default, unless the Judge or presiding officer before whom such verdict shall be obtained" shall certify, &c. So, also, the 21 Jac. 1, c. 16, s. 6, deprives a plaintiff of costs in actions of slander, "if the jury upon the trial of the issue in such action, or the jury that shall inquire of the damages," find a verdict under 40s. If the word "verdict" in the 129th section of the County Courts' Act is to be understood as including a verdict upon a writ of inquiry, it will follow that the plaintiff may be deprived of costs, if the form of his action be assumpsit, but not if it be in debt, where there is no assessment of damages, -a distinction which cannot have been intended, and for which there can be no good reason.

REED v.
SHRUBSOLE.

Wise, contrà. The cases of Harris v. Lloyd (d); and Strutton v. Whitwell (e), which have been cited, have no application in the present case; for they are decisions turning upon the 23 Geo. 2, c. 33 (the Middlesex County Court Act), the 19th section of which deprives the plaintiff of costs, where "the jury upon the trial of such cause shall find the damages for the plaintiff under the value of 40s."—language altogether different from that of the 129th section of the County Courts' Act. It is admitted that the sheriff

⁽a) 1 Bing. 182; S. C. 7 Moore, 602.

⁽b) 8 Scott, N. R. 760.

⁽c) 1 Ld. Raym. 181.

⁽d) 4 M. & S. 171.

⁽e) 1 M. & R. 562.

REED 0.
SHRUBSOLE.

has no power to certify; Pritchard v. McGill (a); Jones v. Bond (b); but that is immaterial; for as the verdict is under 51, the plaintiff, it is submitted, is ipso facto deprived of costs,-the 129th section of the County Courts Act declaring, that if "a verdict shall be found for the plaintiff" for less than 51 in an action of tort, "the said plaintiff shall have judgment to recover such sum only, and no costs." At all events, it has been held that the fact that a cause was tried by a Judge who has no power to certify, does not prevent the defendant from entering a suggestion to deprive the plaintiff of costs; Bishop v. Marsh (c); Forbes v. Simmons (d). [Williams, J.—There it was by the act of the plaintiff that the cause was tried by the sheriff; here it is owing to the default of the defendant that the cause was not tried.] The object of the Legislature was to deprive a plaintiff of his costs if he brought a frivolous action in the superior Courts. The jury in the present case have by the amount of their verdict shewn that the action was frivolous, and the act was, therefore, intended to apply to it. At common law the plaintiff was not entitled to costs; the Statute of Gloucester (6 Edw. 1, c. 1, s. 2), gives him them if he recovers damages; but the 129th section of the County Courts' Act deprives him of those costs where the damages recovered are less than 51, unless the Judge certifies; and as the damages recovered in this case are less than 51., and there is no certificate of a Judge, the plaintiff is not entitled to the benefit of the Statute of Gloucester. If there be any circumstance which takes the case out of the 129th section, the plaintiff should state it in answer to the defendant's affidavits; Nind v. Rhodes (e). In pleading, it would be for the plaintiff to assert, and not for the defendant in the first instance to

⁽a) 2 M. & W. 380; S. C. 5 Dowl. 731.

⁽b) 5 Dowl. 455; S. C. nom. Jones v. Barnes, 2 M. & W. 313.

⁽c) 6 Bing. N. C. 12; S. C.

⁸ Dowl. 1; 8 Scott, 128. (d) 9 Dowl. 37; S. C. 2 Scott, N. R. 198. See Capes v. Jones, ante, vol. 3, p. 779.

⁽e) Ante, vol. 5, p. 621.

deny, that the Judge certified; Simpson v. Ready (a); Pilhington v. Cooke (b). [Wilde, C. J.—This is not a question of pleading, but of construction; and the question is, whether the word "verdict" in the former part of the section is not so controlled by the language of the latter part, as to mean only a verdict upon a trial. If the Court hold that that is the meaning of the word, every action will in future be defended, and where the defendant has no defence he will plead a false plea, and put the plaintiff to the expense and delay of going to trial, in order that the case may be brought within the provisions of the 129th section. But the word "verdict" must be understood in its ordinary sense, viz., the finding of a jury; and it seems to have been the opinion of the Court of Common Pleas, in Barnard v. Moss (c), and of Gould, J., in Biddulph v. Cooper (d), that the words "found by a jury" in the 8 & 9 Wm. 3, c. 11, s. 3 (e), would be satisfied by the finding upon a writ of inquiry as well as upon a trial.

REED v.
SHRUBSOLE.

Creasy, in reply, cited Taylor v. Rolf(f); Brooker v. Cooper (g); Jones v. Brown (h); and Lewis v. Hance (i).

WILDE, C. J.—It seems to me, after the best consideration I can give,—though I own I have not come to the conclusion without doubt and difficulty,—that this case is not within the County Courts' Act, and that a suggestion to deprive the plaintiff of costs ought not to have been

- (a) 12 M. & W. 736; S. C. ante, vol. 1, p. 1024.
- (b) 16 M. & W. 615; S. C. ante, vol. 4, p. 347.
 - (c) 1 H. Bl. 107.
- (d) Cited in Barnard v. Moss, 1 H. Bl. 108.
- (e) Which enacts, that in "actions of debt upon the statute, for not setting forth tithes, wherein the single value or damages found by the jury shall not exceed

the sum of twenty nobles," "the plaintiff obtaining judgment, or any award of execution after plea pleaded, or demurrer joined therein, shall likewise recover his costs of suit."

- (f) 5 Q. B. 337.
- (g) 3 Exch. 112.
- (h) 2 Exch. 329; S. C. ante, vol. 5, p. 716.
 - (i) Ante, vol. 5, p. 641.

REED . SHRUBSOLE.

Two objections have been urged against the entered. suggestion: the first is, that there was no opportunity, in the present case, of obtaining the certificate contemplated by the latter part of the 129th section; and the second, that this is a case in which there has been no trial, and, consequently, that a "verdict" has not been found, such as it was intended by that section should be found, in order to deprive the plaintiff of costs. The first objection is answered by the cases of Bishop \forall . Marsh (a), and Forbes \forall . Simmons (b), where it was held, under the Middlesex Court of Requests' Act, that the operation of the section of that act which deprived a plaintiff of costs, was not excluded by reason of the cause having been so dealt with that the certificate of a Judge could not be obtained. The second objection, however, appears, I own, well founded. Looking at the frame of the clause in question, it seems to me to be confined to the case in which there has been a trial of the cause, and that its framers never contemplated the case of a judgment by default and an assessment of damages for less than 5L upon a writ of inquiry. The section begins by enacting, "that if any action shall be commenced after the passing of this act in any of her Majesty's superior Courts of record," "for which a plaint might have been entered in any Court holden under this act, and a verdict shall be found for the plaintiff for a sum less than 201, if the said action is founded on contract, or less than 51. if it be founded on tort, the said plaintiff shall" "recover such sum only, and no costs." If the clause had stopped there, its construction would have been attended with more difficulty; but,—notwithstanding the argument, based upon the rule of pleading, that the defendant would not be bound to plead more than this part of the clause, and that he might leave it to the plaintiff to plead the latter part of the section in reply,—I think that, for the purpose of ascertaining the meaning of the clause, I ought to look at the whole of it.

⁽a) 6 Bing. N. C. 12.

⁽b) 9 Dowl. 37. See Capes v. Jones, ante, vol. 3, p. 779.

The section, then, proceeds, "and if a verdict shall not be found for the plaintiff the defendant shall be entitled to his costs as between attorney and client, unless in either case the Judge who shall try the cause shall certify," &c. part of the clause, surely, cannot apply to a case where judgment goes by default, although that judgment be interlocutory only, for the cause has passed that stage in its progress where a verdict might have been found; and the difficulty of holding that it applies to all cases where there is no verdict (as that word is generally understood) found for the plaintiff, is much increased when it is considered that the finding of a verdict can always be prevented by the defendant, who may thus not only deprive the plaintiff of his own costs but subject him to the payment of those of the defendant. In some cases the Court assesses the damages without the intervention of a jury; and can it have been intended that, in those cases, the plaintiff is not only to lose his own costs, but also to pay those of the defendant? Many of such cases may involve questions of the greatest importance, although the damages may be inconsiderable. siderations satisfy my mind that the section contemplates and provides for only those cases where a trial has taken place, and has resulted in a verdict for the plaintiff for less than the sum required by the act, or in a verdict against The able and ingenious argument of the counsel for the defendant is not lost upon me. This construction of the section may possibly induce a defendant to enter a false plea and go to trial, instead of suffering judgment to go by default; nevertheless, I think that the framers of the clause never contemplated the case of judgment by default. Their attention was directed to other objects, and they over-I am, therefore, of opinion that the looked that case. plaintiff is entitled to his costs in this action.

COLTMAN, J.—I am of the same opinion. It is quite clear that the plaintiff is entitled to his costs by the Statute of Gloucester, unless they have been taken away by the

RKED v.
SHRUBSOLE.

REED S. SHRUBBOLE.

129th section of the County Courts' Act. It may be, no doubt, that the plaintiff's right to costs may be taken away, although from the course of proceeding in the cause, he has not had an opportunity of obtaining the certificate which is necessary to entitle him to them,—and here the plaintiff has had no such opportunity—but I think that we must not, in considering the true meaning of this section, cast away the proviso at the end of it. We must look at it all together, and take the proviso as throwing light upon the other parts of the section. In this view, then, the section appears to me to contemplate and provide for those cases only in which there has been a trial of the cause and a verdict. The words "unless in either case the Judge who shall try the cause," reflect back on the former part of the section, and shew that it applies only where there has been a trial. Such appears to me, upon the best consideration I can give. the meaning of the section; and I think that the adoption of any other construction would introduce great embarrasment, and frequently deprive plaintiffs of their costs most unjustly. I am, therefore, of opinion, that the plaintiff is entitled to judgment.

CRESSWELL, J.—I entertain very great doubt whether the opinion of my Lord and my Brother Coltman is correct; and I am bound to express that doubt, as I am unable to concur in their view. The question depends upon the 129th section. It has been decided in three or four cases, that where costs are taken away unless a certain thing be done, the deprivation of costs is not limited to those cases in which that thing can be done. We must therefore construe the first part of the section as if the latter part did not exist. It enacts, that if "a verdict shall be found for the plaintiff for a sum less than 201, if the said action is founded on contract, or less than 51 if it be founded on tort, the said plaintiff shall have judgment" for "such sum only, and no costs." The word "verdict" in common parlance means, no doubt, the finding of the jury upon the trial of an issue; but

it also frequently means the finding of a jury upon an inquisition of damages. It has the latter, as well as the former meaning, in Lord Denman's Act (3 & 4 Vict. c. 24,) and I do not know why we are to put a more limited construction upon it in the present section. It is said that the latter part of the clause,-" and if a verdict shall not be found for the plaintiff the defendant shall be entitled to his costs as between attorney and client, unless" "the Judge who shall try the cause shall certify," &c.,-limits the preceding part to those cases only where a verdict has been found by a jury upon the trial of a cause. I do not see why it should have that effect. I see no reason for not holding it to apply to a case where the Court gives judgment without the intervention of a jury. It may be, indeed, that difficulties would arise from such a construction: but without attempting to foresee or suggest all the difficulties which may occur from the opposite one, it may perhaps be found that there is no very manifest preponderance of disadvantage on one side or the other. But it is better to throw aside such considerations, and to confine ourselves to the words of the Now, the 58th section excludes from the jurisdiction of the County Courts certain cases which are generally supposed to involve difficult questions of law, or to concern very much the feelings of parties, and where the amount of damages is frequently not a correct index of the importance of the inquiry; but in all other cases it was intended by the Legislature, that the County Courts should have jurisdiction, whatever might be the difficulty or importance of the questions involved. Then the 129th section applies, in terms, to all cases within the jurisdiction of the County Courts; and wherever they have jurisdiction, the plaintiff in an action in the superior Courts is not entitled to costs unless he obtain a verdict beyond the amount specified in the act. In this case the plaintiff was not, in the estimation of the jury, entitled to that amount; and I therefore think, that the act has deprived him of his costs, and, consequently, that our judgment ought to be for the defendant.

REED v. SHRUBBOLE.

REED v. SHRUBBOLE.

WILLIAMS, J.—I agree with the Lord Chief Justice and my Brother Coltman, that the plaintiff is entitled to our judgment. The question is, has there been a verdict in this case for less than 5L within the meaning of the 129th section; and I think there has not. In my opinion, the word "verdict" in the section in question, means a finding by a jury upon the trial of a cause, and not a finding upon a writ of inquiry after judgment by default, or after demurrer. I agree with my Brother Cressoell that the statute has excluded the jurisdiction of the County Courts in many cases where questions of difficulty and importance may arise: still I think that the statute also contemplated many cases not falling within the 58th section, where an action might properly be brought in the superior Courts, notwithstanding a plaint might have been entered in the County Court; for otherwise the 129th section would not have contained the clause which empowers a Judge to certify for costs when the verdict should be against the plaintiff, or below the specified amount. Suppose, for example, such an action were brought, founded upon a contract, and the plaintiff obtained a verdict for 15L, the statute intends that the plaintiff should, in such a case, have his costs. that be so, it would be absurd to say, that notwithstanding a case is very fit to be tried in the superior Courts, the defendant shall, by his own act, as by suffering judgment to go by default, have the power of depriving the plaintiff of costs. If the language of the section were so plain as to admit of no other interpretation, then that must, notwithstanding its incongruity, be adopted; but if its language admits of an interpretation which avoids such incongruity, I think we ought to adopt it. Now, all incongruity is avoided in the present case by giving to the word "verdict" the meaning of a verdict upon the trial of a cause. If we did not do so, it would follow, that if upon an action upon a bill of exchange, judgment were to go by default, and the damages were to be assessed by the Court in the usual way upon a rule to compute, the plaintiff would not only

lose his own costs, but have to pay those of the defendant as between attorney and client. I, therefore, think that we must adopt the narrower meaning of the word "verdict" in this section, and that the plaintiff is entitled to judgment.

1849. REED SHRUBSOLE.

Judgment for the Plaintiff.

WYNN v. NICHOLSON.

A SSUMPSIT for money had and received.

The cause was referred to arbitration by an order of nisi prius, which contained the usual clause, empowering the Court to remit the matters referred to the reconsideration of the arbitrator. Before proceeding with the reference, ment of certhe parties agreed upon the correctness of certain items contained in two accounts, and it was agreed that such due to the items should be inserted in a statement of account, which be annexed was to be prepared by the plaintiff's attorney, and annexed to the order. to the order of reference. Two of those items were as follows:

February, 1842. Balance due to W. Wynn, 750L, February, 1843. Balance due to W. Wynn, 460L

By a mistake of the copying clerk, the latter sum was stated as the balance due in the former year also, and the no power to arbitrator in making his award acted upon that misstatement, and credited the plaintiff with 460% only, as due to him at that date. Upon the discovery of the mistake,

Wells, upon an affidavit stating the above facts, moved for a rule, calling upon the defendant to shew cause why the Court should not amend the order of reference, by inserting the sum of 750L in the place of 460L, and why the award should not be referred back to the arbitrator to be amended. [Wilde, C. J.—Have we power to make the

Upon a cause being referred to arbitration by order of nisi prius, the parties agreed hat a statetain sums admitted to be sums was 750%. but, by the mistake of the copying clerk, written in its place. Held, that

the Court had correct the mistake.

WYNN v. Nicholson.

amendment?] In Jones v. Price (a), Littledale, J., after consulting the other Judges, allowed the amendment of a mistake which was made in the order of reference by transposing the Christian and surname of the parties. [Wilde, C. J.—The mistake in that case was made by the officer of the Court; here the alleged mistake is that of the parties.] The mistake is obviously a clerical one only, and the Court will interfere to prevent the injustice which the plaintiff must otherwise suffer from it. [Wilde, C. J.— The Court cannot receive affidavits to explain the intention of the parties in contradiction to the written document in which they have embodied their agreement.] In Evans v. Senor (b), the Court amended an order of reference by inserting additional matter. [Pearman v. Carter (c); In re Hall and Hinds (d); Phillips v. Evans (e); and Hands v. Clements (f), were also cited.

WILDE, C. J.—The Court has no power to grant this application, and there is no instance in which it has interfered in the way now asked. The case of Evans v. Senor is altogether different from the present one. parties agreed, through their counsel at nisi prius, that the defendant should sell the plaintiff certain premises, but the order of nisi prius contained no agreement that the defendant should execute a conveyance. The Court amended the order, by adding a direction that the defendant should execute a conveyance; and the ground upon which that addition was made was, that it was in effect included in the original agreement, for the execution of a conveyance is but the legal consequence of an agree-There is, however, a mistake in the report ment to sell. of that case. The judgment of Gibbs, C. J., refers only to ordering a conveyance to be executed; but the report

(a) 2 Dowl. 410.

Scott, N. R. 250.

(b) 5 Taunt. 661.

(e) 12 M. & W. 309.

(c) 2 Chit. 29.

(f) 11 M. & W. 816.

(d) 2 M. & G. 847; S. C. 3

says, that the rule, which directed also that the defendant should make a good title, was made absolute. The Court, however, cannot have put a man in peril of an attachment for not doing that which he might, perhaps, have been unable to do. Here we are asked not to set aside the award, but to vary the order of reference, by making the defendant a debtor on one item in an account, to the amount of 750L. instead of 460l. If the submission to arbitration had been by deed, the Court clearly could not have interfered; and I do not think we can do so in the present case. Possibly a Court of equity might give the plaintiff relief, for it has jurisdiction to correct a mistake. There are, undoubtedly, cases in which this Court has amended orders of reference; but the amendments have been made for the purpose of giving effect to the original intention of the parties, which were misunderstood by the officer of the Court who drew up the order; and in those cases also, the amendment was made by referring to the records of the Court, and was nothing more than the amendment by the Court of the mistake of its officer.

COLTMAN, J.—If we were warranted in making this amendment, we would gladly do so, for the furtherance of justice. If this had been the mistake of the officer of the Court, we would have amended it, because it would have been in effect the mistake of the Court; but it is the mistake of the plaintiff himself.

CRESSWELL, J., and WILLIAMS, J., concurred.

Rule refused.

WYNN v. NICHOLSON.

1849.

JOHNSON v. WARD.

An affidavit stating that the plaintiff did not dwell more than twenty miles from the defendant, but dwelt within twenty miles from the defendant, that is to say, at A. B., is insufficient to support a rule for entering a suggestion to deprive the plaintiff of costs under the County Courts' Act.

THIS was a rule for entering a suggestion to deprive the plaintiff of costs under the County Courts' Act.

The affidavit upon which the rule was obtained, after stating that the action was tried before the sheriff of Middlesex, when the plaintiff obtained a verdict for 12L, alleged, "that at the time of the commencement of this action, the plaintiff did not dwell more than twenty miles from the defendant, but dwelt within twenty miles from the defendant, that is to say, that the defendant dwelt at No. 33, John Street, Portland Town, in the county of Middlesex," &c.

Joyce shewed cause. The affidavit does not shew that the plaintiff dwelt within twenty miles from the dwelling of the defendant. It is consistent with it, that the parties resided twice that distance from each other. [He was then stopped by the Court.]

Ball, in support of the rule. The affidavit contains a direct statement that the plaintiff resided within twenty miles from the defendant; and that is not qualified by the subsequent statement of the defendant's residence. [Cresswell, J.—The affidavit does not state where the plaintiff resided; it merely states that the defendant resided within twenty miles from the plaintiff, not from the plaintiff's residence.]

Per Curiam.—The objection must prevail.

Rule discharged.

1849.

BARDELL v. MILLER.

THIS was a rule, calling upon the plaintiff to shew cause The copy of why the copy of the writ, and the service thereof upon the mons indorsed defendant, should not be set aside for irregularity.

It appeared that the writ of summons in this case bore interest, at date the 14th of April, 1849, and that the defendant was "from the 31st on that day served with a copy of it, upon which was the of March," without stating following indorsement: "The plaintiff claims 1022 5s., and of what yes interest thereon, at 4l. per cent. per annum, from the 31st with the service thereof, for of March"—without stating of what year—"till payment, irregularity. for debt," &c.

with a claim for 102L and

Gaselee, Serjt., shewed cause. The only year mentioned in the writ is the year 1849, in which it is dated, and the month of March, mentioned in the indorsement, will be intended to be in that year. The defendant cannot have been misled. In Coppelo v. Brown (a), it was held, that an indorsement claiming interest upon the debt "from the 10th day of March last," was sufficient.

Talfourd, Serjt., in support of the rule. The amount claimed must be distinctly stated in the indorsement; but here that has not been done, for it is uncertain what amount of interest is claimed, the day and month from which it is to be computed not being referred to any particular year. [Wilde, C. J.—It was held, in Humphries v. Cullingwood (b), that it was no objection to the notice to appear at the foot of a bill of Middlesex, that it wholly omitted to state the The present case, however, is governed by the Reg. Gen., Hilary Term, 2 Wm. 4, r. 2, which orders, "that, upon every bailable writ and warrant, and upon the copy of any process served for the payment of any debt, the

⁽a) 1 C., M. & R. 575; S. C. 3 Dowl, 166.

⁽b) 2 B. & A. 642.

BARDELL b. MILLER. amount of the debt shall be stated;" and this rule is made applicable to writs of summons by the Reg. Gen., Michaelmas Term, 3 Wm. 4, r. 5. In *Chapman* v. *Becke* (a), the indorsement upon the copy served on the defendant, was that the plaintiff claimed "150L, and interest, for debt," and *Patteson*, J., set aside the writ, copy, and service (b).

WILDE, C. J.—I regret that a party should be put to expense by a rule which was intended to prevent expense. The rule, however, is one of general convenience, and it is important that its due observance should be enforced. Its object is to inform the defendant of the sum which the plaintiff is willing to take, and, upon payment of which, an end is to be put to the litigation. is extremely simple in its nature, and presents no great difficulty, and requires the exercise of no extraordinary care in order to be complied with. Where the terms of a rule are, as in the present instance, very simple and definite, I think it best to adhere strictly to it, giving it a fair and reasonable construction. Here the plaintiff says he seeks to recover interest at 4l. per cent. from the month of March; but whether he means from the month of March in the year in which the writ is dated, or any other month of March, does not appear. The consequence is, that the amount of the debt sought to be recovered does not appear, and the terms of the rule, therefore, have not been complied with. The rule to set aside the copy of the writ and the service of it must be made absolute.

The rest of the Court concurred.

Rule absolute.

was taken too late; and Allen v. Bussey, ante, vol. 4, p. 430, where the objection was that the rate of interest was not specified.

⁽a) Ante, vol. 3, p. 350.

⁽b) See also Fryer v. Smith, ante, vol. 1, p. 75; S. C. 5 M. & G. 605; 6 Scott, N. R. 658; where, however, the objection

1849.

CUNLIFFE and Another v. MALTASS.

THIS was a rule calling upon the plaintiffs to shew cause If the affidavit why two orders of *Patteson*, J., and the capias issued in to hold to bail shew a good pursuance of the first of them, should not be set aside, as to part only and why the recognizance of the defendant's special bail of the amount should not be vacated, and an exoneretur be entered on defendant has the bail-piece in this action, upon the defendant entering been arrested, and the valid a common appearance. The first of the above mentioned portion of the affidavit be orders bore date the 3rd of March, 1849, and gave the separable from plaintiffs leave to issue a capias against the defendant, indorsed to hold him to bail for 10501. The affidavit of the plaintiff Cunliffe, upon which that order was made, stated 1 & 2 Vict. that the defendant was indebted to the plaintiffs in the to make a above mentioned sum, being the balance due upon four second order upon the same bills of exchange, which amounted together to 1550l.; and described the defendant as the drawer of the first, and the sum for which payee and indorser of the other three. It also duly alleged is to give bail, presentment and notice of dishonour to the defendant of to the amount of the debt the first, third, and fourth bills, but omitted such averment properly sworn with respect to the second bill, which was for 500L defendant, upon being arrested, applied to the same learned stated that the Judge to be discharged out of custody, on the ground that defendant owed the the affidavit disclosed no cause of action against him as to plaintiff a balance of 1050L the second bill; but his Lordship refused the application; upon four bills of exchange, ordering, however, at the same time, by an order dated the as to one of 10th of March, that the amount of bail should be reduced which, how-Special bail to that amount was accordingly put it did not disin and perfected, without prejudice to an application to cause of action. the Court such as that now made.

Byles, Serjt., and Taprell shewed cause. Two questions applied to the arise in this case: first, whether the Judge had power to discharged,

the defective part, the Judge has power, under the c. 110, s. 6, ducing the the defendant

An affidavit to hold to bail ever, for 500L. The defendant having been arrested for the larger sum, Judge to be on account of the defect in

the affidavit as to the said bill. The Judge refused the application, but ordered that the amount of bail should be reduced by the said sum of 500*L. Held*, that the Judge had power to make the second order, and that the original affidavit was sufficient to authorize him to make it.

CUNLIFFE and Another v.

make the second order; and if so, secondly, whether the affidavit was sufficient to support it. The affidavit discloses, beyond dispute, a good cause of action against the defendant upon the first, third, and fourth bills of exchange; and shews, therefore, a good debt for 550L, the amount due upon those bills. The second order, therefore, is one which the Judge had jurisdiction to make, if the affidavit in support of it was sufficient. That affidavit was good in part, and bad in part; but as the former was separable from the latter, and shewed a debt due for the amount for which the second order was made, it is sufficient. question underwent much discussion, and several conflicting decisions were made upon it; but it was ultimately settled by Jones v. Collins (a), where the late Mr. Justice Williams, after consulting the other Judges, adopted the rule established by Prior v. Lucas (b), that "where the total amount sworn to is not mixed up with what is partly good and partly bad, but where distinct and separate causes of action in separate amounts are sworn to, one of which is properly, and the other improperly sworn to, the affidavit is good as to that amount, in respect of which it is correct; and that the Court will not discharge the defendant altogether for such an objection." That case has overruled Kirk v. Almond (c), which was cited when this rule was moved for, and was followed by Parke, B., in The Bank of England v. Reid (d).

Channell, Serjt., in support of the rule. The affidavit is not sufficient to support an order to hold to bail, even for the sum mentioned in the second order; for it does not state that the amount of each bill is due, but only that 1050l., "being the balance" upon the four bills, is due; so that there is no good part capable of severance from the rest of the affidavit. But even if there were, the learned

⁽a) 6 Dowl. 526, 533.

⁽d) 8 Dowl. 848; S. C. 7 M.

⁽b) 1 Har. & W. 365, n.

[&]amp; W. 159.

⁽c) 1 Dowl. 318.

Judge had no jurisdiction to make the second order. He might have made an order for the amount properly sworn to, in the first instance; but the affidavit, having been already used for the larger sum, could not be again used in support of a second order. [Caunce v. Rigby (a) was referred to.]

CUNLIFFE and Another s. MALTASS.

WILDE, C. J.—This case comes before the Court upon the 3rd section of the 1 & 2 Vict. c. 110, which empowers a Judge, under certain circumstances, to make an order to hold a party to bail. At common law, and before the passing of that act, a capias was the commencement of the action; but although the power to hold to bail was restricted by statute to cases where the debt was sworn to be of a certain amount, a capias was not void if it was wrongly indorsed for too large an amount of bail, but the practice was, to apply to set aside the capias and discharge the defendant, upon his entering an appearance and filing common bail. The 1 & 2 Vict. c. 110, has made a writ of summons, and not a capias, the commencement of an action: but a capias may now be issued at any stage of the cause to prevent the plaintiff's losing his debt by the flight of his debtor. Under the 3rd section of the act the arrest is made, not by force of the affidavit stating that a debt of a certain amount is due, but by the order of the Judge, to whom a discretion is given—to be judicially, and not arbitrarily, exercised—of fixing the amount at which the party is to be held to bail, such amount not exceeding the amount of the debt. Formerly, when the capias was the commencement of the action, the affidavit of debt was required to be distinct; and in acting under the recent statute, the Courts have so far adhered to the old practice as to require certainty in the affidavit upon which an application for a capias is made. In the present case it CUNLIFFE and Another v.

appears that the Judge, in the first instance, ordered the writ to be indorsed for bail to the amount mentioned in the affidavit. The defendant was arrested; and thereupon he applied to the Judge to discharge him out of custody, on the ground that the whole amount for which he was arrested, was not properly sworn to. The learned Judge took that view of the case which was most favorable to the defendant; and thinking that the affidavit failed to shew a good cause of action as to a portion of the demand, ordered the amount of bail to be reduced to 5501. The defendant is not in a position to make any other application than such as he might have made to the Judge. section of the act authorizes the Judge or the Court to discharge such order, or to make such order therein as to such Judge or Court shall seem fit. The Judge, therefore, had jurisdiction to make the order to bail for 550L, and we see no reason for setting it aside. It was not denied during the argument, that a party who is arrested and held to bail for more than is due, is not entitled to be discharged, if the affidavit shews that a debt was due for which an arrest was justifiable. And further, it was not disputed that a party may be arrested for a less sum than that for which he is sued, when the amount for which he is arrested may be distinctly and with sufficient certainty collected from the affidavit to be due. Now, in whatever way the affidavit may be construed, it distinctly shews that the plaintiffs have a good cause of action for 550L But it is said that the defendant is entitled to be discharged altogether, because he has been arrested for a larger sum than he owed; and this consequence was sought to be deduced from some observations made by Alderson, B., in Caunce v. Rigby (a), which do not, in my opinion, warrant the argu-The affidavit in that case shewed the existence of a debt of a certain amount, as to which there was a sufficient

(a) 3 M. & W. 67.

cause of action, but it did not appear what amount was indorsed upon the writ; and what the learned Judge said was, that as that did not appear, the Court would not assume that the defendant had been arrested for the sum mentioned in the affidavit. When, therefore, that Judge says that the affidavit was valid, provided the capias was indorsed with only the smaller amount, it is not to be inferred, as has been contended, that he considered that a party would be entitled to be discharged altogether from custody, if the capias were indorsed with a larger sum than was due. Such an inference is not warranted by the passage, and would be inconsistent with the decided cases. As regards the affidavit now before us, nothing has been offered by the defendant against the conclusion to be drawn from it that 550L are due by him; and I therefore think that the order of Patteson, J., was properly made for that amount.

COLTMAN, J.—I think it is to be collected from the cases decided before the 1 & 2 Vict. c. 110, that if two distinct causes of action were stated in the affidavit to hold to bail, one of which was good and the other bad, the defendant was entitled, not to be discharged, but to have the bail reduced to the amount for which a good cause of action was This case occurs under the 3rd section of the statute, under which the Judge has to decide two things upon the materials submitted to him, viz.: first, whether a debt is due; and, secondly, whether he believes that the defendant is going abroad. If these two matters are made out to his satisfaction, he may order the defendant to be held to bail for such amount as he may think fit. possible, however, that the Judge may make a mistake: thus, here, he ordered the defendant to be held to bail for too large an amount. In such a case, the 6th section empowers the party arrested to apply to the Judge or the Court to be discharged out of custody; and enacts, that the

CUNLIFFE and Another 9.
MALTASS.

CUNLIFFE and Another v. MALTASS.

Judge or Court may discharge him, or "make such other order therein as to such Judge or Court shall seem fit." That provision seems to me to give the Judge authority to vary his order to hold to bail, as he has done in the present instance. The mistake which was made in the first instance has been rectified; the defendant has obtained all that he was entitled to, and this rule must, therefore, be discharged.

CRESSWELL, J.—I am of the same opinion. Assuming that there is no sufficient statement shewing a cause of action in respect of the 500L bill, it is clear, beyond controversy, that the affidavit shews that 550l. are due upon bills, which were duly presented, and of the dishonour of which notice was duly given. There was, therefore, a sufficient affidavit to hold to bail for 550L, and the Judge had authority to issue a capias. The Judge may, indeed, have committed an error in ordering bail to be taken for so much as 1050L; but, if so, the 6th section of the 1 & 2 Vict. c. 110, points out how the error is to be remedied. In this case the course there pointed out has been pursued, and the remedy obtained; that is, the amount of bail has been Hopkinson v. Salembier (a), shews that where a defendant has been arrested under a Judge's order, made upon insufficient affidavits, he must not ask to set aside the capias, but should apply to discharge the order under which it was issued. Jones v. Collins (b) overruled the older cases. and establishes, that a person may be arrested and held to bail for the smaller sum, which is properly sworn to. suggested, that there is a distinction between an arrest for the smaller sum only, and an arrest in the first instance for the whole sum mentioned in the affidavit; and that that distinction was not pointed out in that case. I do not think

⁽a) 5 M. & W. 423; S. C. 7 Dowl. 493,

⁽b) 6 Dowl. 526.

the distinction material; and although it does not appear to have been pointedly adverted to in *Jones v. Collins*, it is difficult to suppose that it was not before the Court, as it acted upon an affidavit under which the defendant had been already arrested for a larger sum than was duly sworn to.

CUNLIFFE and Another E. MALTASS.

WILLIAMS, J.—I entirely agree. I think the order of my Brother *Patteson* was right. The objection was quite a technical one, even before the 1 & 2 Vict. c. 110, and since that statute it is much more so.

Rule discharged.

and a judgment of reversal for non joinder in error had been given. By an indorsement on the back of the record, it appeared that the reversal was by consent. BAILEY and Another TUBNER.

Crompton, for the defendant.

Bass, for the plaintiffs, referred to Green v. Watts (a); Bezaliel Knight's case (b).

The arguments used are sufficiently stated in the judgment of the Court.

Cur. adv. vult.

Coleridge, J.—In this case, upon nul tiel record replied to a plea of judgment recovered, the record, when produced, shewed a judgment reversed in error, with an indorsement that it had been so reversed by consent. The judgment was between the plaintiffs and a third party. Mr. Crompton for the defendant, admitted the general rule, that to produce on such an issue a judgment reversed on error, was equivalent to producing no judgment, and, therefore, a failure of record; but contended, that where the judgment was between one of the parties and a stranger, and the reversal by consent, this was presumptively fraudulent; that the defendant could not by anticipation, even if he were aware of the fact, allege the fraud in his plea; and, if the replication were merely nul tiel record, had no means of alleging it in his rejoinder: therefore he contended that the plaintiffs should have replied the reversal, to which the defendant might have rejoined the fraud. He cited no authority for this, nor have I been able to find any; and as a judgment reversed is simply no judgment, it is very questionable whether such a replication as is suggested would not be demurrable. At all events, in the absence

⁽a) 1 Ld. Raym. 274.

⁽b) 2 Id. 1014; S. C. 1 Salk. 329.

1849. BAILEY and Another . TURNER.

of any authority for distinguishing between the case of judgments between the same parties, and those between one party and a stranger, and not seeing that there is any necessary presumption that a reversal by consent is fraudulent, I think the present rule must prevail, and, accordingly, there must be judgment for the plaintiffs.

Judgment for the Plaintiffs (a).

(a) Crompton afterwards applied for and obtained, leave to amend, on payment of costs.

WALKER and Another v. HEWLETT.

A writ of summons in debt was indorsed for a sum under 20L In the declaration the sum claimed was above 20%. Judgment was signed by default; and a ca. sa. issued. The sum inserted in the judgment, and in the mandatory part of the writ, was the sum claimed in the declaration; but the writ was indorsed to levy 121. only, being the amount of debt and costs. Held that

THIS was a rule, calling upon the plaintiffs to shew cause why the writ of ca. sa. issued herein, should not be set aside, and the defendant be discharged out of custody, on the ground that the debt for which he had been arrested was under 20L

It appeared from the affidavits, that the writ of summons in this case was indorsed for the sum of 2l. 19s. 101d. declaration was filed in debt, containing a count for goods sold and delivered, and another on an account stated, each for 201. 1s., and the aggregate claimed was 401. 2s. were no particulars of demand, and judgment was signed by default. The judgment stated the sum recovered to be 40l. 2s., and this was likewise the sum stated in the mandatory part of the writ of ca. sa.; but the indorsement on the writ was to levy the sum of 121. only, being the amount of the debt indorsed on the writ of summons and the costs.

this was a case in which "the sum recovered" did not exceed 201 within the meaning of the 57th section of 7 & 8 Vict. c. 96; and the Court accordingly set aside the writ of ca. sa., and ordered the defendant to be discharged out of custody.

A rule nisi to set aside the writ of ca. sa., and to discharge the defendant out of custody, upon

the above ground, need not be drawn up, upon reading the writ of ca. sa.

Pearson shewed cause. There is a preliminary objection. The rule asks to set aside the writ of ca. sa.; but is not drawn up on reading it.

WALKER and Another o. Hewlett.

COLERIDGE, J.—The defendant has not got the writ. It is in the hands of the sheriff. Besides, the ground of setting it aside is not any defect apparent on the face of the writ; and it is not, therefore, necessary that the rule should be drawn up on reading it.

Pearson. This motion is founded on the 7 & 8 Vict. c. 96, s. 57, which enacts, that "no person shall be taken or charged in execution upon any judgment obtained in any of her Majesty's superior Courts," &c., "in any action for the recovery of any debt wherein the sum recovered shall not exceed the sum of twenty pounds, exclusive of the costs recovered by such judgment." And, by the 58th section, "all persons in execution at the time of passing this act, upon any judgment obtained in any of the Courts aforesaid in any action for the recovery of any debt wherein the sum recovered shall not exceed the sum of 20L exclusive of the costs," &c., shall be discharged out of custody upon application to a Judge. These provisions do not apply to the present case; for here the sum for which judgment had been obtained is a larger sum than 201. It is true, that the amount indorsed on the writ of summons was a smaller sum; but the cases of Bowditch v. Slaney (a), and Jacquot v. Boura (b), shew that if the sum indorsed is not paid within the term limited by the indorsement, the plaintiff may recover a larger sum proved at the trial. The defendant should have pleaded to the action; and not having done so, he is precluded now from disputing the correctness of the amount for which judgment has been obtained; Philpot v. Aslett (c). After judgment, the Court look only to the record. It is not sufficient,

⁽a) 2 Bing. N. C. 142; S. C. nom. 7 Dowl. 331. 2 Scott, 197; 4 Dowl. 140. (c) 2 Dowl. 669; S. C. 1 C., (b) 5 M. & W. 155; S. C. div. M. & R. 85.

WALKER and Another

therefore, if a defendant pleads to the sum contained in the particulars of demand; he must plead to the sum claimed in the declaration; Roche v. Champain (a). In Newton v. Lord Conyngham (b), the Court of Common Pleas refused to allow execution to issue, notwithstanding a writ of error; the ground of error being the award of a writ of ca. sa. for the costs of a nonsuit since the 7 & 8 Vict. c. 96, s. 57; but on the writ of error being afterwards argued, the Court of Exchequer Chamber decided that the case was not within the statute, and that the writ was properly issued. That case is strongly in point. The case of De Medina v. Grove (c), shews that no action would lie against an execution creditor, or his attorney for issuing a fi. fa. indorsed to levy the whole sum recovered by the judgment; although, to the knowledge of both, it had been partly satisfied by payments; unless malice and want of probable cause be alleged in the declaration, and proved.

Lush, in support of the rule, was not called upon.

COLERIDGE, J.—The section in question recites, that "it is expedient to limit the present power of arrest upon final process," and then provides, that no person shall be taken in execution, "upon any judgment," &c., "in any action for the recovery of any debt wherein the sum recovered shall not exceed the sum of 20L," exclusive of costs. It is clear, upon the facts of this case, that the action is really brought for the recovery of a debt of 2L 19s. 10½d. The plaintiffs in their declaration, however, stated the sum, as they might do, as a sum of 40L 2s.; and it is contended on their behalf, that in order to see what is "the sum recovered" within the meaning of the statute, the Court can look only to the pleadings, and to the sum mentioned in the judgment, and appearing on the face of the writ; and cannot inquire into

⁽a) Ante, vol. 5, p. 121; S. C. 1 Exch. 10.

⁽b) Ante, vol. 5, p. 762, 5, n. (c). (c) 10 Q. B. 152.

what was the sum really due. This, however, I think is If it were, as the judgment must follow the sum stated in the declaration, and the writ must follow the judgment, in all actions of debt in which a judgment by default is suffered, the plaintiff might contend that the section would not apply, and the object of the act be defeated. I therefore think, that looking at the substantial meaning and intent of the statute, which is, that small sums of money shall not be recovered by means of imprisoning the person of the debtor, as is here sought to be done, this case comes within the mischief intended to be prevented; and that the rule must, therefore, be absolute.

1849. WALKER and Another HEWLETT.

Rule absolute.

REGINA v. The JUSTICES OF SURREY.

A RULE nisi had been obtained in Hilary Term last, On the trial for a mandamus to the justices of Surrey, commanding of an appeal, them to enter continuances and hear an appeal against an order of reorder of removal of a pauper from the parish of Lambeth had been ento the parish of St. James's, Clerkenwell.

The following facts appeared upon the affidavits. order of removal was dated on the 17th of June, 1848, and on the 29th of August. On the 17th of October, the Michaelmas Sessions were held, at which the appeal was entered and respited. On the 18th of D On the 18th of December, the be given to the appellants gave notice of trial of the appeal at the next had not been Epiphany Sessions, which were held on the 2nd of January, given. The sessions enter-1849. On the appeal coming on to be heard, the respon- tained the

moval, which tered and respited at a The former sessions, it was objected that notice of the required should objection, and refused to hear

the appeal. Held, that the giving notice of the entry and respite, in the case of a respited appeal, was a condition distinct from and in addition to the steps required by law, and which the sessions had no right to impose; and the Court granted a mandamus commanding the sessions to enter continuances and hear the appeal.

REGINA

7.

Justices of Surrey.

dents objected that neither by a distinct notice, nor by service of the order of respite, nor in the notice of trial served, had they received any notice of the entry or respite of the appeal, which according to a practice, which it was sworn had been followed for eighteen years at the Surrey Sessions, the appellants were bound to give. The sessions entertained the objection, and refused to hear the appeal. The present rule was then obtained; against which,

Otter now shewed cause. The question is, whether the sessions may refuse to hear a respited appeal, because a rule of practice at the sessions, requiring a ten days' notice of the entry and respite, has not been complied with. The case of Rex v. Justices of Norfolk (a), seems at first sight an authority against their right to do so. There, the rule of sessions required a month's notice of entry and respite to be given to the respondents; and the sessions having refused to hear an appeal on the ground that such notice was not given, this Court granted a mandamus to compel them to hear it. That case, however, may be considered as virtually overruled, as it was decided upon the ground that the notice of a respited appeal is governed by the 9 Geo. 1, c. 7, s. 8; and it has since been held, in the case of Rex v. The Justices of Monmouthshire (b), that that statute only applies to the first sessions after executing the order of removal, and that the Court will not interfere with the discretion of the magistrates at the second, as to adjournment, if it is in furtherance of a reasonable practice. In Reg. v. The Justices of Montgomeryshire (c), the practice of the sessions required twenty-eight days' notice of the trial of respited appeals to be given; and where that practice had been acted upon, this Court refused to interfere. Where a rule of practice at sessions is not unreasonable, this Court will not interpose to control the discretion of the sessions in

⁽a) 5 B. & Ad. 990; S. C. 8 N. & M. 55.

⁽b) 3 Dowl. 306.

⁽c) Ante, vol. 3, p. 119.

enforcing it; Reg. v. The Justices of Peterborough (a). In Rex v. The Justices of Staffordshire (b), which case will probably be relied on by the appellants, the notice to be given to the justices was unnecessary and useless; and, therefore, the practice was unreasonable. Here the practice is not unreasonable, for when the first sessions after the removal of the pauper have passed by, and no notice of the entry and respite of an appeal has been given, the respondents may fairly presume that the justices at the subsequent sessions will not permit the appeal to be entered.

REGINA

Justices of SURREY.

Pashley and Charnock, in support of the rule. The case last referred to is a strong authority in support of this rule. There the practice of the sessions, when appeals were to be tried against convictions or orders of justices out of sessions, except orders of removals, was to require that notice of appeal should be served on each of the justices making the order; and this Court held that the sessions had no power to make such a rule of practice. Denman, C. J., in giving judgment, says, "the sessions have no right to introduce a new condition of appeal, which is not in the act of Parliament." In Rex v. The Justices of Salop (c), the question was, whether a parol notice of appeal against an order of bastardy was sufficient; and Bayley, J., in giving judgment, says, "we cannot say that a notice in writing is necessary, where it is not required to be in writing by the clause in the statute, which directs a notice to be given. An appeal is usually allowed by statute on certain conditions; and when one of those conditions is, that the party appealing shall give a notice of his appeal, it would be to add a further condition, if we were to hold that such notice must be in writing." In

⁽a) Ante, p. 512. & M. 477. (b) 4 A. & E. 842; S. C. 6 N. (c) 4 B. & A. 626, 9. VOL. VI. B B B D. & L.

REGINA
Justices of Screen.

Reg. v. Justices of the West Riding (a), the question whether the sessions could establish as a rule of p that no appeal against an order of removal could be unless the original order were filed; and Mr. Justic ridge was of opinion that they could not. in giving judgment, says, "I agree" "that the sessio no right to make a rule of law by creating such a co of appeal." The case of Reg. v. The Justices of qomeryshire (b), which has been cited, is distingui The statute requires only that a reasonable notice of shall be given, and the Court held that a practice retwenty-eight days' notice was not so unreasonable induce this Court to interfere. It is so much a ma course to enter and respite at the first sessions af grievance, and to try only at the second, that the 1 dents could not really have been misled; and if the not, Rex v. The Inhabitants of Lambeth (c) shews th sessions ought to have heard the appeal. numerous cases cited in Reg. v. The Justices of gomeryshire, to shew that this Court will review the pr of the Court of quarter sessions, if it is unreasonable the same effect are the cases of Rex v. The Justices West Riding (d); Reg. v. Dunn (e), per Lord Denman, and Reg. v. The Justices of Sussex (f). [They re also to Reg. v. The Justices of Somersetshire (q).]

Cur. adv. 1

ERLE, J.—In this case the appeal had been entere respited, and all the notices required by the general had been given. But a notice of the respite of the

⁽a) 2 Q. B. 705, 716.

⁽b) Ante, vol. 3, p. 119.

⁽c) 3 D. & R. 340. But see Rex v. Justices of Bssex, 2 Chit. 385.

⁽d) 5 B. & Ad. 667; S. (& M. 757.

⁽e) 12 A. & E. 599, 616. (f) 9 Dowl. 125.

⁽g) Ante, vol. 4, p. 741.

required by the practice of the sessions in this county had not been given, and on that ground the hearing of the appeal was refused.

1849. REGINA Justices of SURRRY.

From Rex v. Norfolk (a) I collect, that the power of making rules of practice in respect of hearing an appeal does not extend to the creation of a condition distinct from and in addition to the steps required by law, and to authorize the refusal of a hearing, if such condition be not performed.

The notice of respite now in question appears to be such a condition. It follows that the appeal ought to have been heard, and, therefore, the rule must be absolute.

Rule absolute.

(a) 5 B. & Ad. 990.

WELCHMAN, Administratrix, &c. v. STURGIS.

THIS was a rule, calling upon the defendant to shew A defendant cause why the sum of 155l. 2s. 2d., paid into Court by the arrested upon defendant in this cause, in lieu of special bail, should not be a writ of capias issued under paid out of Court to the plaintiff's agent in this cause, the 1 & 2 Vict. plaintiff having recovered judgment for the sum of 194L, was discharged damages and costs: and why the plaintiff should not be upon paying the amount paid the costs of and occasioned by this application out of indorsed on such sum of 155l. 2s. 2d., the residue being applied towards gether with the satisfaction of the damages and costs recovered in this into the hands cause.

having been c. 110, s. 3, of the sheriff. That sum was afterwards

paid into Court, together with a further sum of 10L for costs in lieu of special bail, pursuant to the 7 & 8 Geo. 4, c. 71, s. 2. The plaintiff obtained a verdict in the action for a sum less than the sum indorsed on the writ, and for which the defendant was held to bail; but which, together with the costs in the action, considerably exceeded the amount paid in for debt and costs: Held, that the plaintiff was entitled, under the 7 & 8 Geo. 4, c. 71, s. 2, to have the whole amount paid over to him; and not merely the sum for which he had recovered a verdict, together with 20% for costs.

WEICHMAN

To.

STURGIS.

It appeared upon the affidavits, that the defendan been arrested at the suit of the plaintiff, under th Vict. c. 110, s. 3; the sum indorsed upon the wri 135L 2s. 2d., and 10L for costs, was deposited in th of the sheriff of Bristol, and afterwards the further 10L was paid into Court for further costs, in lieu fecting special bail. At the trial of the cause Monmouth Spring Assizes, 1849, the plaintiff, it as had a verdict entered for 95L 11s. 2d.; and final ju was duly signed on the 25th of April, 1849, for 194 the costs and damages in the cause. The costs of th amounted to about 100L, and the question now was, the plaintiff was entitled to have the whole sum paid him, or only the sum for which he had obtained a together with the sum of 20L, which had been pe Court for the costs.

Keating shewed cause. By the 4th section of the Vict. c. 110, a defendant arrested upon a capias under the 3rd section, may deposit the sum indorsed writ, together with 10L, for costs, "according to the 1 practice of the said superior Courts; and all subseque ceedings as to the putting in and perfecting special I of making deposit and payment of money into Court, i of putting in and perfecting special bail," "shall be acc to the like practice of the said superior Courts, or a thereto as the circumstances of the case will admit." 7 & 8 Geo. 4, c. 71, s. 2, after reciting that, by the 43 (c. 46, a defendant might be discharged from arrest depositing in the hands of the sheriff the sum indon the writ, and that it was expedient to extend its prov it is enacted, that "it shall be lawful for such defe instead of putting in" "special bail in the action, acc to the course and practice of the Court, to allow the s deposited with the sheriff," &c., "together with the tional sum of 10L, to be paid into Court by such defe

as a further security for the costs of the action, to remain in the Court to abide the event of the suit." The section goes on to provide, that "in case judgment in the said action shall be given for the plaintiff, he shall be entitled, by order of the Court, upon motion made for that purpose, to receive the said money so remaining in, or so deposited or paid into the Court as aforesaid, or so much thereof as will be sufficient to satisfy the sum recovered by the judgment and the costs of the application." It is submitted, that as the Legislature only requires that the sum of 201. altogether should be paid in by way of securing the costs of the action, it means to limit the plaintiff's claim upon the amount paid into Court in respect of costs to that sum. To give a contrary construction to the act of Parliament would be to hold out a strong temptation to plaintiffs to make false affidavits of the amount due to them, in order to cover the costs as well as the debt sought to be recovered.

Gray, in support of the rule, was stopped by the Court.

COLERIDGE, J.—It seems to me that the words of the statute 7 & 8 Geo. 4, c. 71, s. 2, are to be looked to in order to decide this case, and that they are sufficient. That section says, that the money so paid in, with the additional sum of 10L, is "to remain in the Court to abide the event of the suit;" and that "in case judgment," &c., "shall be given for the plaintiff," then he is to receive the money so paid in, "or so much thereof as will be sufficient to satisfy the sum recovered by the judgment and the costs of the application." It makes a distinction between "the sum recovered by the judgment" and "the costs of the application;" and I therefore think, that the costs of the action were intended to be included in the former sum, and that the plaintiff is entitled to them as well as to the costs of this application. The rule must be absolute.

Rule absolute.

WELCHMAN

b.
STURGIS.

1849.

D'EBRO P. SCHMIDT.

[In the full Court. Coram Patteson, J. (a), Wight and Erle, J.]

Where a defendant. who has paid money into Court in lieu of bail to the action, afterwards obtains a judgment as in case of a nossuit, a rule to pay the money so de-posited, out of Court to him, is in this Court a rule nisi only.

CLEASBY moved for a rule absolute in instance, directing that the money paid in defendant in this action in lieu of bail, should out to him; he having obtained a judgment as ir a nonsuit against the plaintiff. The only que whether it ought to be a rule absolute in the first i As error cannot be brought on a judgment as in c nonsuit, it is not easy to see what cause could be sl a rule nisi only were granted. In Grant v. Willi is true, it was held that such a rule ought to be a 1 only (c). But in the subsequent case of White v. Ur the Court of Exchequer granted a rule absolute in instance. The case of Vale v. Ganter (e) shews the application cannot be included in the rule for judge in case of a nonsuit. An application has been n Mr. Justice Coleridge in the Bail Court, to grant 1 in this form; but his Lordship referred the applica the full Court.

ERLE, J.—I understand from Mr. Hill (the clerk rules), that this point was raised some time ago be Brother *Patteson* in the Bail Court, and that he that it ought to be a rule nisi only; and that sin time, that decision has been acted on in this



⁽a) Lord Denman, C. J., was 5 Bing. 269; S. C. 2 absent from illness.

⁽b) 4 Dowl. 581.

⁽d) 8 Dowl. 202.

⁽c) See also Symes v. Rose,

⁽e) 9 Dowl. 106.

Judgments are sometimes irregularly signed; and it is but right that a party should have an opportunity of shewing cause before the money is paid out of Court. D'EBRO v. Schmidt.

PATTESON, J., and WIGHTMAN, J., concurred.

PER CURIAM.

Rule nisi.

INDEX

TO THE

PRINCIPAL MATTERS.

ABATEMENT.

See Non-Joinder of Co-defendants. Plea, 11.

ABROAD (PARTY RESIDING).

See Limitations (Statute of), 2.

ACCOMMODATION, BILL OF EXCHANGE.

See DE INJURIA, (REPLICATION OF).

AFFIDAVIT.

See Attachment, 1.

Bail (Affidavit to hold to).

Married Woman (Acknowledgment of).

Non-Joinder of Co-defendant.

Practice, 1.

AFFIDAVIT (DATE OF).

- 1. An affidavit stated the date of an event, as "the 19th of this present month of January." Held, that the jurat might be looked to, to see that the month of January, 1849, was intended. Craig and Another v. Lloyd, 487
- 2. An affidavit in support of a motion to set aside a judgment for irregularity, stated that the judgment was signed "this day." Held, that

the jurat of the affidavit might be looked to in order to fix the date. Holmes v. The London and South Western Railway Company. (In the full Court),

AFFIDAVIT (TITLE OF).

Affidavits in support of a motion to compel an attorney to pay over money which he has received as attorney in a cause, may be entitled "in the matter of the attorney," and need not be entitled in the cause. In re Wood, Gent., One, &c.,

AGGRAVATION (MATTER OF).

See Declaration, 1.

AMENDMENT.

See Reference (Order of), 2. Writ of Error.

1. At nisi prius, proof being given of a promise by the plaintiff to marry the defendant, the Judge allowed the consideration to be amended, by adding the words "and would, within a reasonable time after her arrival there, marry the defendant:" Held, that the amendment was authorized by the 3 & 4 Wm. 4, c. 42, s. 23, and that the fact of the amendment curing a defect which would otherwise render

the declaration bad in arrest of judgment, was no objection to its being made. Harvey v. Johnston, 120

2. A declaration by indorse against drawer of a bill of exchange, averred presentment to, and non payment by, the acceptor. The defendant pleaded a traverse of the presentment, and that he had had no notice of dishonour. Upon the trial, it was proved that the acceptor had died before the bill became due; that the drawer was his executor, and that the holder had called at the residence of the acceptor, and seeing the drawer, who informed him of his being the executor of the acceptor, had presented the bill to him.

Held, first, that the Judge had properly allowed the declaration to be amended, by striking out the averment of presentment, and substituting a statement of the death of the acceptor, of the defendant being his executor, and presentment to the defendant as executor.

And, secondly, that the defendant had, as drawer, sufficient notice of dishonour. Caunt v. Thompson, 621

APOTHECARY.

An apothecary may sue for medical attendance and medicines supplied within ten miles of the city of London, although his certificate of qualification in terms restricts his authority to practise to England and Wales, except the city of London, and ten miles from it. Young v. Geiger, 337

APPEAL.

1. A party claiming an exemption from a highway rate, should appeal against the rate; and if he has allowed the time limited for appeal to expire, he cannot set up the claim to exemption, as an answer to a rule under the 11 & 12 Vict. c. 44, s. 5, calling upon the justices to issue a distress warrant for levying upon his goods the sum of money alleged to be due from him in respect of that rate.

The Surveyors of the Highways in the Parish of Bletchingdon v. H. Peyton and H. Styles, Esquires, and the Rev. Thos. Dand,

2. A former decision upon the merits in favour of the putative father, is an answer to an application, by the mother of a bastard child, for an order of maintenance, under the 7 & 8 Vict. c. 101, s. 3; but the petty sessions, and the quarter sessions on appeal, have jurisdiction to inquire whether or not such former decision was, in point of fact, come to; and, if the proof in their estimation fails, to make the order; and this Court will not interfere to review their decision, being upon a question of fact within their jurisdiction.

On an appeal against an order of maintenance, the appellant raised a preliminary objection to the jurisdiction of the petty sessions to make the order; and upon its being overruled, declined proceeding further with the case: Held, that the sessions were justified in confirming the order, without hearing further evidence, notwithstanding the 8 & 9 Vict. c. 10, s. 6. Regina v. William Robinson, 295

3. A parish, upon whom an order of removal was served, appealed against the order. On the appeal coming on to be heard, the appellants were called upon to prove the order of removal, which, according to the practice of the sessions, they were bound to do, but which they could not do, as the original order had not been served. but only a copy, and they had given no notice to produce the original, so as to admit secondary evidence of it. The sessions accordingly dismissed the appeal. On the following day, the paupers were removed; upon which the appellants again appealed, and on the appeal coming on to be tried, and being found to be against the same order as the former appeal, the sessions dismissed it on that ground. Held, on motion for a mandamus to compel the sessions to hear the appeal, that the sessions, acting

upon a reasonable practice in their Court, were entitled to dispose of the first appeal, after the hearing was entered upon; and having done so, that there was no further right of appeal on the removal of the pauper. Regina v. Justices of Peterborough, 512

4. On the trial of an appeal, against an order of removal, which had been entered and respited at a former sessions, it was objected that notice of the entry and respite, which the practice of the session required should be given to the respondents, had not been given. The sessions entertained the objection, and refused to hear the appeal. Held, that the giving notice of the entry and respite, in the case of a respited appeal, was a condition distinct from and in addition to the steps required by law, and which the sessions had no right to impose; and the Court granted a mandamus commanding the sessions to enter continuances and hear the appeal. Regina v. The Justices of Surrey,

APPEARANCE.

See IRREGULARITY.

APPEARANCE (Sec. Stat.)

1. During Term, the Court alone, and not a Judge at Chambers, has power to authorize the plaintiff to enter an appearance for the defendant after distringas. Ross v. Gandell, 698

2. Actual personal service of the writ of summons must be effected in order to obtain leave to enter an appearance for the defendant, sec. stat. Christmas v. Eicke,

ARBITRATION.

1. An incorporated company were served with a writ in debt. An attorney on their behalf entered an appearance for them, and consented to a Judge's order to refer "the claims of the plaintiff in the action" to arbitration. When the parties were before the arbitrator, the plaintiff

adduced evidence of a claim of 10,307l. Os. 1d., which was included in his particulars, but, to the proof of which, objection was made on behalf of the defendants, on the ground that it was a claim for unliquidated damages. The arbitrator received the evidence, and made his award for a sum of 14,000l. odd, including the above sum. The appointment of the attorney was not under seal, but it appeared that the company had notice of the proceedings taken by the attorney, and had not interfered.

On a rule under the 1 & 2 Vict. c. 110, s. 18, calling upon the company to pay the sum awarded: Held, that the question before the arbitrator having been whether the sum in dispute was one of "the claims of the plaintiff in the action," and he having decided that it was, his decision on this matter was final; and that the proper course for the company to have pursued was at once to have applied to a Judge to revoke the submission, on the ground that the arbitrator was exceeding his authority; and that not having done so, they were bound by his decision.

Held also, that the company having notice of the proceedings, and not having interfered, were estopped from contending that the attorney was not duly appointed under seal, or that he had no authority to refer. Faviell v. The Eastern Counties Railway Company, 54

- 2. An arbitrator, who had, under the usual power conferred by an order of reference, on several occasions enlarged the time for making his award, permitted the period of the last enlargement to pass without a further enlargement; the Court held that it had power under the 3 & 4 Wm. 4, c. 42, s. 39, still further to enlarge the time for the arbitrator to make his award. Leslie v. Richardson, 91
- By an order of a learned Judge, a cause was referred to two arbitrators, and in the event of their disagreeing, to an umpire, with power to examine

the parties to the suit. The day fixed for making the award was the 20th of April. That period was subsequently enlarged by consent to the 10th of October. On the 24th of July, the defendant died. On the 17th of October, by an order of a Judge, the time limited for the arbitrators to make their award was extended to the 7th of November. The umpire, on the 6th of November, made an award in favour of the plaintiff. On motion made on the last day but two of Michaelmas Term to set aside the Judge's order for enlarging the time: Held, too late.

Semble, that the Judge had the power to make the order of enlargement, notwithstanding the time for making the award had expired, and one of the parties to the submission had died.

Semble also, that the award, though made by the umpire, was valid.

Bowen v. Williams, 235

- 4. Where an award directed that A. should pay whatever sums B. should be compelled to pay in respect of a certain bill of exchange, the Court refused a rule nisi for an attachment against A. for non payment of what B. stated he had been compelled to pay; and refused also a rule under 1 & 2 Vict. c. 110, s. 18, calling on A. to shew cause why he should not pay that sum. Graham v. D'Arcy, 385
- 5. A general verdict was taken for the plaintiff on all the issues in an action, subject to a reference of that and another cross action between the same parties, in which issue had not been joined, with power to the arbitrator to make "an award or certificate." The arbitrator delivered two papers, containing two certificates for the two causes: Held, on motion to set aside the certificates, that it might be intended that the papers were made at the same time; and, if so, they would be one instrument, containing the decision of each cause, written on separate paper for the purpose of being applied to the separate causes.

By an order of reference at nisi prius, a general verdict was found for the plaintiff in a cause in which there were several issues, subject to the award or certificate of an arbitrator, "the costs of the cause to abide the event," and the arbitrator, by his certificate, directed that the verdict found should stand, and the damages be reduced to a certain sum: Held, on motion to set aside the certificate, that a specific finding on each issue was not necessary.

Where a Judge's order, made by consent of the parties, in a cause in which it was not clear that issues had been joined, authorized "final judgment or judgment as in case of nonsuit, to be signed by the plaintiff or defendants, as the case may be, or in such manner, or upon such terms, as may be decided by the award or certificate of the arbitrator;" the Court refused, on motion to set aside a certificate of the arbitrator "that final judgment should be signed for the defendants in this cause," as being uncertain, and not specifically disposing of the issues. In re an Arbitration, between William Smith and Another. plaintiffs, and Henry Reece, defendants, and between Henry Reece, plaintiff, and William Smith and Another, defendants, 520

6. By a deed of arbitration between S. L. and J. S., after reciting that J. S. had committed trespasses upon, and worked the coal of certain mines belonging to S. L., it was referred to two arbitrators to award what amount should be paid by J. S. for these injuries; "the costs and charges of the agreement, and the costs, &c., of and attending or incident to the arbitration or award, including the payment to be made to the said referees and their umpire," &c., " to be borne and paid by J. S., and to be awarded accordingly." The award found the amount to be paid by J. S. for the value of the injuries to be 8881. 5s.; and that the costs incident, &c. to the award, "including the payment

to be paid to us the said referees, amounting in the whole to the sum of 36l. 16s. 4d., should be paid by the said J. S. to Mr. J. O., at the office of," &c., "on the delivery of this our award." There was no mention made as to the costs of the agreement of reference. A rule having been obtained, calling on J. S. to shew cause why he should not pay the sum of 888L 5s.: Held, that it was no answer that the costs of the agreement of reference were not included in the award: or that the costs of the reference and the award were awarded in one sum; or that they were awarded to a stranger: as the damages were clearly separable from the costs; and the award might be enforced as to the former, without reference to the latter.

Where the time for making an award had been duly enlarged, but by mistake appeared in the recital of the award to have been enlarged after the time for doing so had expired: Held, no ground for refusing to enforce the award. In re an Arbitration, between Samuel Lloyd the Younger, and Others, and Joseph Spittle. In re an Arbitration between Samuel Addison and Joseph Spittle, 531

ARGUMENTATIVE TRAVERSE

See LANDLORD AND TENANT. PLEA, 3, 9.

ARREST.

See Privilege from Arrest. Sheriff.

ARREST OF JUDGMENT.

See Amendment, 1.
Declaration, 2, 3, 7.
Replevin.

ASSIGNEES OF BANKRUPT.

See BANKRUPT (Assignees of).

ESTOPPEL.

ATTACHMENT.

See Arbitration, 4.

1. Where there are several de-

fendants in an action, and it is sought to attach the plaintiff for non payment of costs, the affidavit denying the payment must be made by all the defendants. Manuell v. Thompson and Others, 91

2. An attachment will not be granted against an attorney for disobedience to a rule of Court, ordering him to deliver his bill of costs within a time named, unless a demand be first made of him for his bill by one of the persons to whom he is by the rule ordered to deliver it. In re Cattlin,

ATTORNEY.

See Affidavit (Title of).
Arbitration, 1.
Attachment, 2.
Bailiff (Fees of).
Lien.
Reference, Order of, (Authority to consent to), 1.
Replication, 1, 5.

1. The 6 & 7 Vict. c. 73, s. 26, disables an attorney, who is uncertificated, from suing only for fees, reward, or disbursement for any business, matter, or thing done by him as an attorney or solicitor in some suit or proceeding in one of the Courts mentioned in the act; and not for business done which has no reference to such suits or proceedings. Richards v. Lord Suffield, 22

2. The attorney of the plaintiff has no authority to order the discharge of the defendant out of custody upon final process, upon any other terms than those of payment of debt and costs.

Therefore, where the plaintiff's attorney, upon the defendant paying a portion of the debt, and giving a warrant of attorney to secure the balance, directed the sheriff to discharge him out of custody, which the sheriff accordingly did: *Held*, that the sheriff was liable as for an escape. *Connop* v. *Challis and Another*, 48

ATTORNEY (BILL OF COSTS).

1. A solicitor was employed in a purchase under a decree of the Court of Chancery, in a cause of 'Hancock v. Round.' His bill to his client was headed 'Yourself v. Round,' but indorsed 'Hancock v. Round,' and contained a number of items, none of which specifically referred by name to the cause, or to the Court in which the business was done, but all appeared to be descriptive either of conveyancing business, or of business done in the Courts of the Lord Chancellor and Vice Chancellor, and the offices of the Accountant General and Masters.

Held, that by reasonable intendment, the names of the cause and of the Court in which the business was done, sufficiently appeared. Sargent v. Gannon, 691

- 2. In an action on an attorney's bill against a member of a managing committee of a railway company, a delivery of a signed bill to another member of the managing committee at his residence, is not a sufficient delivery under the 6 & 7 Vict. c. 73, s. 37. Edwards and Others v. Lawless.
- 3. An attorney's bill of costs having been referred to taxation, certain items were objected to before the Master, on the ground that the attorney at the time those items were incurred, was uncertificated; and the Master accordingly disallowed them: Held, that the Master acted rightly in disallowing the items, and that it was no ground for reviewing the taxation. In re Angell, Gent., One, &c. 144
- 4. A provisional committee, of which defendant was an active member, was formed in August, 1845, to establish a railway company. An office was taken for the business of the company in M. Street, and registered in November, 1845, and a brass plate was affixed to the door with the title of the company engraved on it. The scheme was abandoned on the

5th of January, 1846, from which time the defendant ceased to attend at the office, or to intermeddle with the affairs of the company; but a sub-committee, composed of other persons than the members of the provisional committee, was appointed to wind up the affairs of the company. On the 28th of September, 1846, the plaintiff, a local attorney employed by the provisional committee, left his bill in the hands of a clerk at the office in M. Street, upon the door of which the brass plate continued fixed. The bill was headed and directed to the provisional committee.

Quære, whether such a delivery was a delivery to the defendant "at his place of business?"

Semble, per Wilde, C. J., and Williams, J., that it was not; and per Coltman, J., and Maule, J., that it was. Blandy v. De Burgh, 412

5. In an action on an attorney's bill, after verdict for the plaintiff on an issue joined of no signed bill delivered to the defendant: *Held*, that proof of delivery of a bill of costs by an attorney to the servant of the defendant at his dwelling-house, was sufficient. *M'Gregor v. Keiley*, 635

ATTORNEY GENERAL.

See PRACTICE, 1.

AWARD.

See ARBITRATION.

Rule for Payment of Money, (Under 1 & 2 Vict. c. 110, s. 18).

BAIL, (AFFIDAVIT TO HOLD TO).

1. An affidavit of debt to hold to bail, stated that the defendant was and still is indebted to the plaintiff in the sum of 337L, part of which being the amount of the debt and part the amount of the costs paid in an action brought against him by the indorsee of a bill of exchange, drawn by E. H.

B., which he had accepted for the accommodation of the defendant on his request conveyed through the said E. H. B. or his clerk: *Held*, that the affidavit was sufficient. *Stratton* v. *Matthews*,

2. If the affidavit to hold to bail shew a good cause of action as to part only of the amount for which the defendant has been arrested, and the valid portion of the affidavit be separable from the defective part, the Judge has power under the 1 & 2 Vict. c. 110, s. 6, to make a second order upon the same affidavit, reducing the sum for which the defendant is to give bail, to the amount of the debt properly sworn to.

An affidavit to hold to bail stated that the defendant owed the plaintiff a balance of 1050L, upon four bills of exchange, as to one of which, however for 500L, it did not disclose a good cause of action. The defendant having been arrested for the larger sum, applied to the Judge to be discharged, on account of the defect in the affidavit as to the said bill. Judge refused the application, but ordered that the amount of bail should be reduced by the said sum of 500l. Held, that the Judge had power to make the second order, and that the original affidavit was sufficient to Cunliffe authorize him to make it. and Another v. Maltass. 723

3. Where an affidavit to obtain a Judge's order for arrest under the 1 & 2 Vict. c. 110, s. 3, stated the debt to be on "a bill of exchange," and the declaration was on a "foreign bill of exchange;" the Court refused, on motion, to discharge the bail, on the ground of variance. Phillips v. Don.

BAIL, MONEY DEPOSITED, (IN LIEU OF).

A defendant having been arrested upon a writ of capias issued under
 & 2 Vict. c. 110, s. 3, was discharged upon paying the amount

indorsed on the writ, together with 101. for costs, into the hands of the That sum was afterwards sheriff. paid into Court, together with a further sum of 10l. for costs in lieu of special bail, pursuant to the 7 & 8 Geo. 4, c. 71, s. 2. The plaintiff obtained a verdict in the action for a sum less than the sum indorsed on the writ. and for which the defendant was held to bail; but which, together with the costs in the action, considerably exceeded the amount paid in for debt and costs: Held, that the plaintiff was entitled, under the 7 & 8 Geo. 4, c. 71, s. 2, to have the whole amount paid over to him; and not merely the sum for which he had recovered a verdict, together with 201. for costs. Welchman, Administratrix, &c. v. Sturgis,

2. Where a defendant, who has paid money into Court in lieu of bail to the action, afterwards obtains a judgment as in case of a nonsuit, a rule to pay the money so deposited, out of Court to him, is in this Court a rule nisi only. D'Ebro v. Schmidt, 742

BAILIFF (FEES OF).

The attorney, and not the client, is the party liable in an action brought by a sheriff's officer to recover the amount of execution fees for an arrest under a ca. sa., made by the direction of the attorney. Mailé v. Mann, 42

BAILMENT.

See Declaration, 11.

"BALANCE OF ACCOUNT."

See Costs, (Suggestion to DE-PRIVE PLAINTIFF OF), 8.

BANKING COMPANY.

See Scire Facias.

BANKRUPT.

To an action against the sheriff for an escape, *Held*, on special demurrer, that it was a good plea under the 5 & 6 Vict. c. 122, s. 23, that a fiat had issued under which the prisoner had been, by the proper Court, declared bankrupt, that he had been arrested while returning from his surrender, and that on the production of his summons duly signed, the defendant had discharged him; without averring that he had been duly declared bankrupt.

The words "such bankrupt" in the 5 & 6 Vict. c. 122, s. 23, mean the party so adjudged bankrupt; a bankrupt de facto, even though he be not a bankrupt de jure. Norton v. Walker,

BANKRUPT, (ASSIGNEES OF).

See SEVERAL COUNTS.

Upon a feigned issue directed at the instance of the sheriff, between the assignees of a bankrupt and an execution creditor, the assignees must rely on their own title, and are not entitled to set up the jus tertii.

Upon such an issue it is not competent for the assignees to deny that the goods were seized by the sheriff by virtue of the defendant's writ. Belcher and Others, Assignees of Brown, a Bankrupt v. Patten, 370

BANKRUPT (REPRESENTA-TION MADE BY).

See ESTOPPEL.

BANKRUPTCY.

See Notice of Act of Bankruptcy.

BILL OF EXCHANGE.

See Corporation.

COSTS (SUGGESTION TO DEPRIVE PLAINTIFF OF), 1.
COUNTY COURT.
DE INJURIA (REPLICATION OF).
PLEA, 2, 6, 8, 9, 12.
REPLICATION, 2, 4.
Drawn by a corporation, and in-

dorsed by them not under seal. Halifax and Others v. Lyle, 424

BILL OF EXCHANGE (ACCEPTANCE OF).

See PLEA, 6, 9.

BILL OF EXCHANGE (PLEA OF PAYMENT OF).

See PLEA, 8.

BONA FIDES.

See Notice of Action.

BOND.

See Declaration, 4.

BREACH (SUFFICIENT).

See Declaration, 4, 6, 8, 9.

BREACHES (SEVERAL).

See DECLARATION, 8.

BROKER'S BOOK.

See Inspection of Documents.

CALLS (ACTION FOR).

See PLEAS (PLEADING SEVERAL), 3.

CALLS (SET-OFF FOR).

See Joint Stock Company, 6.

CAPIAS (WRIT OF).

See DECLARATION, 7.

CAPIAS AD SATISFACIENDUM.

See DISCHARGE OF DEFENDANT (Under 7 & 8 Vict. c. 96, s. 57). Writ, 2.

CASE, ACTION ON THE, (AGAINST SHERIFF).

See Distress. Ferry, Right to.

CASUAL EJECTOR (JUDG-MENT AGAINST).

See EJECTMENT.
REPLICATION, 3.

CERTIFICATE.

See Arbitration, 5.

CERTIORARI.

1. A Judge has power, under the 90th section of the 9 & 10 Vict. c. 95, (County Courts' Act), to order a writ of certiorari to issue upon an ex parte application. Symonds v. Dimsdale, 17

2. An application for a certiorari to remove an action of replevin from a County Court into one of the superior Courts at Westminster, under the 9 & 10 Vict. c. 95, s. 121, should be made to a Judge at Chambers, and not to the full Court. Bowen v. Evans,

3. A certiorari to bring up a case from the sessions, was issued in December 1848, on an affidavit of due service of notice on two magistrates, sworn to have been present at the time the order was made. A rule nisi to quash the order of sessions was obtained on the 8th of May in Easter Term, 1849, the return to the certiorari being filed nearly at the same time. A rule nisi to quash the certiorari on affidavits denying the presence of one of those magistrates, was obtained in Michaelmas Term, 1849: Held, too late. Regina v. The Inhabitants of Basingstoke,

CHRISTIAN NAME.

See Plea, 8.

CLERK OF PLAINTIFF'S ATTORNEY.

See Notice of Act of BANKRUPTCY.

COMMON CARRIERS.

See PLBA, 7.

VOL. VI.

CORPORATION.

CONDITION OF BOND.

See DECLARATION, 4.

CONSENT RULE.

See EJECTMENT, 2.

CONSIDERATION.

See Declaration, 5. Plea, 5.

CONVERSION.

See DECLARATION, 1.

COPY.

See DEED, (PROOF OF).

COPYRIGHT, (ACTION FOR INFRINGEMENT OF).

The 16th section of the Copyright Act (5 & 6 Vict. c. 45), which requires a defendant intending to set up the title of a third person, to the copyright alleged to have been infringed, to specify, in the notice of objection, the name of such person, &c., precludes a defendant who has omitted to give such notice, from taking such objection even where it arises upon the plaintiff's evidence. Leader and Another v. Purday,

CORPORATION.

See Arbitration, 1.
Bill of Exchange.
Plea, 9.

In a declaration against a corporation, it is sufficient to describe the defendants by their corporate title, without stating how they were incorporated.

A declaration which describes the defendants as a "company," impliedly alleges that the company is a corporation. Woolf v. The City Steam Boat Company,

CCC

COSTS.

See Bail, (Money Deposited in Lieu of), 1. Joint Stock Company, 4. Prosecutor. Staying Proceedings, 2, 4.

- 1. If the amount of money paid into Court by the defendant, exceed 40s., the plaintiff is entitled to his costs; although the Judge, at the trial, certifies that the jury have "found a verdict for 1s. and no more." Richards v. Black, 334
- 2. The rule that a party to entitle himself to have the costs of witnesses allowed on taxation, must have previously actually paid them, applies as well to the case of a plaintiff who sues in forma pauperis, as to that of any other plaintiff.

An order was made in the usual form under Reg. Gen., Hilary Term, 4 Wm. 4, Pt. 1, r. 20, that the costs of proving certain documents not admitted by the defendant, and which should "be proved at the trial to the satisfaction of the Judge or other presiding officer, certified by his indorsement thereon," should be paid by the defendant, in any event. At the trial, in consequence of the admission of the defendant's counsel, the documents were not proved, and no certificate was given. Held, on motion to review the taxation, that the Master acted rightly in refusing to allow the costs of witnesses to prove the documents.

Held also, that the plaintiff having failed in the action, was not entitled to the costs of a witness whose evidence was applicable to an issue on which he succeeded, but who was also called to support one on which he failed. Freeman v. Rasher, 517

3. A defendant obtaining judgment as in case of a nonsuit, is entitled to his costs in the cause, although his only plea was a plea of payment of money into Court. McLean v. Phillips, 697

COSTS, (BILL OF).

See Attachment, 2.
Attornet, (Bill of Costs).

COSTS, (SECURITY FOR).

See Security for Costs.

COSTS, (SUGGESTION TO DE-PRIVE PLAINTIFF OF).

See JUDGE AT CHAMBERS.

1. On an application to ener a suggestion on the roll to denive a plaintiff of costs under the 9 k 10 Vict. c. 95, s. 129, it is only necessary that the affidavit should negative the exceptions in the 128th section, and if the plaintiff relies on the case coming within the provisions of some other section which would except it from the operation of the 129th section, it is for him to shew that fact, and the defendant need not negative it in the first instance.

If a reasonable doubt exists, upon the affidavits, as to the fact whether the case comes within the 129th section or not, the Court will permit the suggestion to be entered; leaving the plaintiff to traverse or demur to it.

Quære, if actions on bills of exchange under 20L are within the jurisdiction of the County Courts. Butler v. Corney,

- 2. In order to entitle a defendant to enter a suggestion under the London County Court Act, 10 & 11 Vict. c. lxxi. s. 113, it is necessary that the affidavits supporting the application should describe the particulars of the residence of the defendant at the time of the action being brought; and, therefore, an affidavit merely stating that the defendant dwelt in the city of London, without giving the particulars of his address, was held insufficient. Peterson and Another v. Davis,
- 3. In an action brought in this Court on a tailor's hill, under 201. it appeared that the plaintiff resided and carried on his business within the jurisdiction of the Clerkenwell County

Court; that the defendant resided within that of Brompton, and carried on his business within that of Westminster. The bill consisted of twentyone items. As to three of these, the orders for them were given, and the goods delivered at the defendant's residence, and the work done at the plaintiff's residence. As to ten others, the orders were given and the goods delivered at the defendant's place of business, and the work done at plain-And in one case, tiff's residence. both the order was given, the work done, and the goods delivered at plaintiff's residence: Held, that these items were so connected as to form but one cause of action; that one item having arisen within the jurisdiction of a County Court, the cause arose "in a material point" within that jurisdiction; that the Superior Court had no concurrent jurisdiction under the 9 & 10 Vict. c. 95, s. 128; and that, therefore, the case came within the 129th section, which deprives the plaintiff of costs. Wood v. Perry, 194

- 4. To deprive the plaintiff of costs under the 9 & 10 Vict. c. 95, s. 129, it is necessary that a suggestion should be entered on the roll; for which purpose the defendant must shew affirmatively by affidavit that the plaintiff does not come within any of the exceptions specified in the 128th section. Brooker v. Cooper. 199
- 5. The Court will not grant leave to enter a suggestion on the roll to deprive a plaintiff of costs under the 9 & 10 Vict. c. 95, s. 129, after judgment and execution, and while the judgment is still subsisting. The proper course to pursue is to move to set aside the judgment and execution, and then to enter a suggestion. Soames and Another v. Cooper, 238
- 6. A defendant is entitled to enter a suggestion to deprive the plaintiff of costs under the 9 & 10 Vict. c. 95, s. 129, upon making out a primâ facie case, which is not denied by the plaintiff.

[Since overruled by the Common Pleas, in Easter Term, 1850. See

Kirby v. Hickson, 1 L. M. & P.,

Upon making absolute a rule for entering a suggestion, the Court will not give costs, as the suggestion may be traversed. Hayter and Another v. Fish.

- 7. The affidavit in support of a rule for entering a suggestion to deprive the plaintiff of costs under the County Courts' Act, must shew that the case does not fall within the three exceptions in the 128th section of the County Courts Act. Dodd v. Wigley.
- 8. Where the debt for which the plaintiff sues in the superior Courts exceeds 201., but the amount is reduced below that sum by a set-off, the defendant is not entitled to enter a suggestion to deprive the plaintiff of costs under the County Courts' Act. Woodhams v. Newman. 683
- 9. The 129th section of the County Courts' Act, which deprives a plaintiff of costs if a verdict be found for him for less than 201 in contract, or 51 in tort, only applies to cases where a verdict has been found upon the trial of the cause.

Therefore, where a defendant suffered judgment by default, and the jury upon a writ of inquiry assessed the damages at 40s.

Held, per Wilde, C. J., Coltman, J., and Williams, J., (Cresswell, J., dissentiente,) upon demurrer to a suggestion entered by defendant to deprive plaintiff of costs, that the plaintiff was entitled to his costs. Reed v. Shrubsole.

10. An affidavit stating that the plaintiff did not dwell more than twenty miles from the defendant, but dwelt within twenty miles from the defendant, that is to say, at A. B., is insufficient to support a rule for entering a suggestion to deprive the plaintiff of costs under the County Courts' Act. Johnson v. Ward, 720

CO-TENANT (CONSENT OF).

See DECLARATION, 9.

c c c 2

COUNTY COURT.

See CERTIORARI, 1. COSTS (SUGGESTION TO DEPRIVE PLAINTIFF OF). PROHIBITION. REPLEVIN.

Bills of exchange are within the jurisdiction of the County Courts established by the 9 & 10 Vict. c. 95.

Whether the service of a writ of summons issuing out of the County Court is good, is a matter peculiarly for the decision of the Judge.

A summons issued under section 60. 9 & 10 Vict. c. 95, "by leave of the Court," need not state on the face of it that it was so issued. Waters v. Handley, 88

COURT OF EXCHEQUER. See REVENUE MATTERS.

COVENANT (ALTERNATIVE) See DECLARATION, 6.

COVERTURE (PLEA OF). See PLEA, 11.

DAMAGES (PLEA TO DEBT AND).

See DECLARATION, 10.

DATES (MATERIAL).

See VIDELICET.

DEBT.

See DECLARATION, 10.

DECLARATION.

See CORPORATION. PRACTICE. 2. Scire Facias, 4. SEVERAL COUNTS. SHERIPP.

1. To a declaration in trespass for breaking and entering the plaintiff's bouse, and taking and carrying a his goods and chattels then b in the same, and converting and posing thereof to the defendants' the defendants pleaded a justific of the entry, that the dwelling-l was the freehold of T. P., and they entered as his servants, and cause the plaintiff's goods were cumbering on the close, they ren them off to a convenient dist Held, on special demurrer, tha allegation in the declaration of conversion of the goods was matter of aggravation, and that plea, therefore, was not bad for ting to justify it. Pratt v. Prat Others.

2. Where the maker of a note it payable to his own order, an dorsed it in blank, it was held the instrument was not a promi note negotiable under the st 3 & 4 Ann. c. 9, s. 1; but the the indorsement, the holder obt a right of action against the ma and, therefore, where a declar described such an instrument "promissory note," it was held although it might be bad on st demurrer, yet the defendant ha pleaded over, the objection was available in arrest of judgment: although an allegation in the d ration, that the defendant had dorsed" the instrument, might objectionable on special demum was not available in arrest of i ment. Brown v. De Winton,

3. A declaration against the m of a promissory note alleged the made the note payable to his order, and indorsed it to S. & who indorsed it to the plaint Held, on motion to arrest the i ment, that although the instru was not, in point of law, a promis note within the 3 & 4 Ann. c. 9, but a note payable to bearer; ye against the maker who had indo it, it must be taken to be a valid missory note, payable to S. & Co order; and, consequently, that declaration would only be open

special demurrer for not correctly setting out the legal effect of the instrument. Gay and Another v. Lander, 75

4. A declaration in debt set out a bond for the payment of a certain sum of money to the plaintiffs or E. upon request, whereby and by reason of the non payment thereof, an action accrued, &c. The defendants craved oyer, and set out the bond correctly, and then stated the recitals in the condition, without distinguishing them from the bond. They then craved oyer of the condition, and set it out without the recitals, and concluded by pleading performance generally by the defendants only. The plaintiffs prayed that the bond and condition might be enrolled; they were then set out correctly, and it appeared that the condition was, that the defendants and L. should pay over sums of money assessed and collected by L., and that L. should demand the sums assessed, and proceed against defaulters. The plaintiffs demurred: Held, first, that it was not necessary to state a request to the defendants in the declaration; secondly, that the averment "by reason of the non payment," &c., did, after plea sufficiently deny payment to the plaintiffs or E.; thirdly, that the plea was bad for not averring performance by Lee; and, fourthly, that it was bad as merely alleging general performance, instead of setting forth in what way the condition had been performed. Kepp and Another v. Wiggett and Others,

5. A promise to marry by a plaintiff, is not essential to the consideration of the defendant's promise to marry a plaintiff; therefore, where a declaration in assumpsit for breach of promise of marriage alleged the consideration for the defendant's promise to be "that the plaintiff, being sole and unmarried, would go to Lisahoppin, in that part of the United Kingdom of Great Britain and Ireland called Ireland, for the purpose of marrying him the defendant: it was held that the consi-

deration was sufficient. Harvey v. Johnston, 120

6. A covenant by the lessee of a farm that he would consume on the premises the crops grown thereon, but that in case he should sell any of the crops, which he should be at liberty to do, he would bring to the premises an equivalent amount of manure, is an alternative covenant, and not an absolute covenant, followed by a proviso.

Consequently, the declaration in an action for not consuming the crops on the premises, should set out both branches of the covenant; otherwise it is a fatal variance. Richards v. Bluck, 325

7. In a declaration against a sheriff for not executing a ca. sa. or a fi. fa., the plaintiff must shew that he had a judgment in his favour to warrant the writ.

The writ of capias given by the 1 & 2 Vict. c. 110, can only be obtained by a person who is plaintiff in the action, and after the commencement of the suit.

Where, therefore, in au action against the sheriff for neglecting to arrest one L., the declaration stated that L. was indebted to the plaintiffs, and being so indebted, the piaintiffs caused, by virtue of a special order made by a learned Judge, to be issued a certain writ, called a capias, against the said L., and directed to the sheriff; but omitted to aver that the plaintiffs were plaintiffs in an action against L., or that a writ of summons had been previously issued: Held bad in arrest of judgment, as it did not shew that the plaintiffs were entitled to the capias; and, therefore, disclosed no duty on the part of the sheriff towards them to execute it. Williams and Another v. Griffith,

8. Assumpsit. The declaration stated that the plaintiff made a policy of insurance with the General Maritime Company upon the goods, body, tackle, apparel, &c., of a certain ship, the ship being valued at 50001.; that

the ship and freight were warranted free from average under 31. per cent. unless general, or the ship were stranded; that the policy also provided that the capital, stock and funds of the said company should alone be liable to make good all claims and demands under that policy, and that no proprietor of the company should be subject to any demands, nor be in anywise charged by reason of that policy. beyond the amount of his share in the stock of the company, it being one of the original rules of the company that the responsibility of individual proprietors should be limited to their shares in the capital stock. in witness whereof, for the amount of 1500L, the defendants thereunto set their hands; and that it was signed by the three defendants as directors. Mutual promises. It then stated that the ship having run aground, it was necessary to throw over two of the anchors, and cut away the cables from them, and that the same were left in the sea, and lost to the plaintiff; that the ship was further injured, and that the masts, ropes, &c., were lost. First breach, that by reason of the said loss of the anchors and cables, the plaintiff sustained a general average loss to a large amount. Second breach, that by reason of the ship being strained and damaged, the plaintiff sustained an average loss on the ship, her masts, ropes, and cables, to a greater amount than 3L per cent. on all the moneys insured thereon, to wit, to the amount of 50l. by the hundred for each hundred, whereby the company became liable to pay a certain sum. Breach, no repayment, though sufficient funds.

Third plea, that the said anchors and cables were not left in the sea and lost.

Fourth plea, to so much of the declaration as alleges that the plaintiff has suffered an average loss on the said ship, &c.; the defendants say that the plaintiff has not suffered an average loss on the said ship or vessel on her masts, ropes, and cables,

to the amount of 31, per cent. on all moneys insured thereon.

Held, on special demurrer, that the pleas were bad, as offering too large traverses.

Held also, that the declaration disclosed a good cause of action against the defendant; but that the second breach was bad, as it did not distinctly state the value of the ship, and shew that the amount of loss sustained exceeded 31. per cent. on that value; and therefore, that the defendant was entitled to judgment on that breach.

Where a declaration contains several breaches, some of which are good, and the others bad, and there is a general demurrer, judgment should be given for the plaintiff on the good, and for the defendant on the bad, breaches. Dawson v. Wrench and Others, 474

9. A declaration in case stated that theretofore, &c., one J. T. was possessed of an undivided moiety of certain land, as tenant in common with his late Majesty, as Duchy of Cornwall; and being so possessed by a certain indenture, made between the said J. T. and the plaintiff, the said J. T. granted to the plaintiff the liberty to dig for and carry away the clay in a certain parcel of the said land, and to make adits, pits, &c., for the more effectual exercise of the liberties so granted &c., for the period of twenty-one years. It then went on to aver that there were at the time, divers clay pits, &c., in the said land, and certain leats, &c., necessary for washing, &c., the said clay; that after the plaintiff had become so entitled, and had begun to enjoy the said liberties under the said grant, with the assent of the tenant in common, the defendant intending, &c., wrongfully obstructed the plaintiff in the use of the said liberties, &c., by destroying certain dams, &c., lawfully erected upon the said land, and diverted the said leats, &c.; whereby the plaintiff was deprived of the benefit of the several liberties so granted to him, &c. : Held, on special demurrer,

first, that the title of the plaintiff being pleaded by way of inducement only, an averment of his seisin in fee was unnecessary. Secondly, that the deed referred to in the declaration, not forming the foundation of the plaintiff's title, profert of it was not required. Thirdly, that the breach was sufficiently laid. Fourthly, that the consent of the co-tenant being immaterial, it was not necessary that it should be shewn. Thriscutt v. Martin and Others, 489

10. The general damage laid at the conclusion of a declaration in debt in the ordinary form, is distributable over the several counts in the declaration.

Where, therefore, to a declaration in debt containing three counts, the defendant pleaded first to 10s., "parcel of the moneys in the first and last count," and secondly, "to the residue of the said first and last counts;" it was held that the latter plea was an answer, not only to the residue of the debts mentioned in the first and third counts, but also to the damages for the detention thereof. Gell v. Burgess, 547

11. The allegation of bailment in a declaration in detinue, is not traversable. Clossman v. White, 563

12. A declaration in case stated, that before, &c., the defendant was employed by certain persons, &c., to make a sewer in a highway: and thereupon theretofore, &c., the defendant kept and continued upon the said highway two iron gratings, "then lying on the said last mentioned" "highway in the custody and care of the defendant, for the purpose of forming the said sewer," without placing any light or signal at or near such iron gratings, or adopting any other means to shew that they were then upon the said highway, whereby, &c. Plea, not guilty: Held, that the allegation that the gratings were " in the custody and care of the defendant," was not matter of inducement or material; and was, therefore, not admitted by the plea of not guilty.

Grew v. Hill, 664

DEED (PROOF OF).

Where a party refuses to produce a deed at the trial, and a copy is duly proved, he cannot afterwards exclude it by producing the original, and requiring it to be proved by the attesting witness. Edmonds v. Challis and Another.

DEFENDANTS (SEVERAL).

See ATTACHMENT, 1.

DE INJURIA (REPLICATION OF).

See REPLICATION, 2.

To a declaration by indorsee against acceptor of a bill of exchange, the defendant pleaded in substance that the bill was accepted for the accommodation of the drawer, upon the terms that he should pay it when due, and that if he should negotiate it, or part with it to any holder, such holder should deliver it to him, the drawer, before or when it became due, to enable him to take it up, and should not retain it after it became due : that the drawer indorsed the bill to the plaintiff with notice of these facts, and that the plaintiff received and always held the bill on the above terms, and retained it, contrary to the said terms: Held, on special demurrer, that de injurià was a good replication to this plea. Robinson v. Little,

DELIVERY OF SIGNED BILL.

See ATTORNEY (BILL OF COSTS),

2, 4, 5.

DEMAND.

See Rule for Payment of Money (under 1 & 2 Vict. c. 110, s. 18).

760 DISCHARGE OF DEFENDANT.

DISTURBANCE, &c.

DEMAND (PARTICULARS OF).

See Particulars of Demand.

DEPARTURE IN PLEADING.

See DISTRESS.
REPLICATION, 4.

DETINUE.

See DECLARATION, 11.

DIMINUTION IN ASSIGNING ERRORS.

See WRIT OF ERROR.

DISCHARGE AND SATISFAC-TION (AGREEMENT IN NA-TURE OF).

See PLEA, 2, 12.

DISCHARGE OF DEFENDANT OUT OF CUSTODY.

See Attorney, 2.

DISCHARGE OF DEFENDANT (UNDER 7 & 8 VICT. c. 96, a. 57).

A writ of summons in debt was indorsed for a sum under 201. In the declaration the sum claimed was above 201. Judgment was signed by default; and a ca. sa. issued. The sum inserted in the judgment, and in the mandatory part of the writ, was the sum claimed in the declaration; but the writ was indorsed to levy 121. only, being the amount of debt and costs. Held, that this was a case in which "the sum recovered" did not exceed 201. within the meaning of the 57th section of 7 & 8 Vict. c. 96; and the Court accordingly set aside the writ of ca. sa., and ordered the defendant to be discharged out of custody.

A rule nisi to set aside the writ of ca. sa., and to discharge the defendant out of custody, upon the above ground, need not be drawn up, upon reading

the writ of ca. sa. Walker and Another v. Hewlett, 732

DISTRESS.

Growing crops seized by the sheriff under a fi. fa., and not severed from the land, are in the custody of the law, although in the hands of the execution creditor under a bill of sale from the sheriff. They, therefore, cannot be distrained for antecedent rent of which the sheriff and the execution creditor had notice, but which they neglected to pay; the remedy of the landlord being by action on the case against the sheriff, and not by way of distress.

Trespass for breaking and entering the closes of the plaintiffs, and cutting down and taking away growing crops. Plea, that one J. L. held the closes as tenant thereof to the defendants, under a certain demise, &c., and that half a year's rent being in arrear, defendants entered to distrain. Replication, shewing a judgment at the suit of the plaintiffs against J. L., and a fi. fa. under which the sheriff seized the crops in question, and sold them to the plaintiffs, and that before a reasonable time had elapsed for cutting and gathering them, the defendants distrained and seized thereon. Rejoinder, that the rent for which the distress was made, became due long before the judgment; that the sheriff and the plaintiffs had due notice of it: that it continued in arrear, and did not exceed one year's rent; that they required the sheriff, before he sold to the plaintiffs, to pay the rent, of which also the plaintiffs had notice, and that it was not paid.

Held, on demurrer, that the rejoinder was bad.

Held also, that the replication was good, and was not a departure from the declaration. Wharton and Another v. Naylor and Another, 136

DISTURBANCE OF A RIGHT.

See DECLARATION, 9.

e Declaration, 9. Ferry (right to).

EASEMENT.

See FERRY (RIGHT TO).

EJECTMENT.

- 1. A declaration in ejectment, intituled as of Trinity Term, 12 Vict., a Term which had not then arrived, instead of 11 Vict., was served on the 18th of October, 1848. The notice, which was without date, called on the tenant to appear in the next Michaelmas Term: Held, that the lessor of the plaintiff was entitled to judgment against the casual ejector. Doe on the demise of Woodhouse v. Roe.
- 2. Where the tenant in ejectment entered an appearance, but delivered the consent rule and plea to the plaintiff's attorney, without any signature: Held, that the plaintiff was entitled to treat the appearance as a nullity, and sign judgment against the casual ejector. The omission, however, being accidental, the Court upon terms ordered the judgment to be set aside, and possession to be restored. Doe dem. Poole v. Willes and Others,

ELECTION OF GUARDIANS OF THE POOR.

See VESTRY MEETING.

ENLARGEMENT OF TIME TO MAKE AWARD.

See Arbitration, 2, 3, 6.

ERASURE.

See Married Woman (Acknowledgment of).

ESCAPE (ACTION FOR).

See Attorney, 2.
BANKRUPT.
PLEA, 11.

ESTOPPEL.

See Arbitration, 1.
Bankrupt (Assignees of).
Plea, 6, 9.
Pleas (Pleading Several), 1.
Replication, 3.

Where a person represents that to be true which he knows to be untrue, with intent to induce, and thereby induces another to act upon that representation; or without knowing it to be untrue, if he means his representation to be acted upon, and it is acted upon accordingly; or if whatever a man's real meaning may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and does act on it as true; the party making the representation will be precluded from averring against the party so acting upon it, a different state of facts as existing at the same time; and such an estoppel in pais need not be pleaded in order to make it obligatory.

Conduct by negligence or omission, when there is a duty cast upon a person by usage of trade or otherwise, to disclose the truth, may often have the same effect. Freeman and Another Assignees, &c. of W. Broadbent v. Cooke,

EVICTION (PLEA OF).

See LANDLORD AND TENANT.

EVIDENCE (ADMITTED AT TRIAL).

See Costs, 2.

EXECUTION.

See Joint Stock Company, 1, 2, 3, 4, 5.

Notice of Act of Bankruptcy.
Plea, 11.
Scire Facias.

762 " FINAL JUDGMENT."

EXECUTOR.

See LIMITATIONS, (STATUTE OF), 2.

Where the rent of premises exceeds their value, the executor of the lessee is, after entry, personally liable for the amount of profit which, by due diligence, he might derive from them. Hopwood v. Whaley, 342

EX PARTE APPLICATION.

See CERTIORARI, 1.

EXTINGUISHMENT (OF CAUSE OF ACTION).

See PLBA, 2.

FEES.

See BAILIFF, (FRES OF).

FEIGNED ISSUE.

See BANKRUPT (Assignees of).

FERRY, RIGHT TO.

Case for disturbance of an ancient ferry from A. to B. and back again. The defendant pleaded that the plaintiffs were not possessed, &c., and that there was no such ancient ferry, &c. At the trial the plaintiffs proved the right to, but not from B. Held, that the plaintiffs were entitled to a verdict as to such part as they proved, and that Reg. Gen., Hil. Term, 4 Wm. 4, tit. " Tresp." r. 6, applied to actions on the case as well as to actions of trespass; and that it made no difference whether the plaintiffs claimed as owners of a franchise, or by virtue of an easement. Giles and Others v. 146 Groves,

FINALITY.

See Arbitration, 1, 4.

"FINAL JUDGMENT."

See Arbitration, 5.

INDICTMENT.

" FOR AND ON ACCOU

FRANCHISE.

See FERRY (RIGHT T

FRAUD.

See Scire Facias, 1

FRAUD (PRESUMP)

See NUL TIEL RECO

FURTHER MAINTENA THE ACTION.

See REPLICATION.

GENERAL ISSUE BY

See LIGHTING AND WATCH

GOVERNORS AND (
DIANS OF THE P(

See VESTRY MEETI

GROWING CROI

See DISTRESS.

HIGHWAY RAT

See APPEAL, 1.

HUSBAND AND W

See Plea, 3, 6, 11. Scire Facias,

IMMATERIAL ALLEC

See Declaration, 1, 12.
JUDGMENT NON OBST.
REDICTO.

INDICTMENT.

See PROSECUTOR.

INDORSE (AUTHORITY TO).

See Declaration, 3. PLEA, 6.

INDUCEMENT (MATTER OF).

See DECLARATION, 12.

INFERIOR COURT.

See STAYING PROCEEDINGS, 5.

INITIAL LETTER OF NAME.

See PLEA, 8.

INSOLVENT.

See Plea, 1.
Staying Proceedings, 2.

- 1. A final order for protection from process, obtained by an insolvent under the 7 & 8 Vict. c. 96, operates not only as a protection to the person of the insolvent, but as an absolute bar to an action for the debts as to which it is a protection. Platell v. Bevill.
- 2. Plea of final order for protection under 7 & 8 Vict. c. 96, is an absolute bar to an action for the debts as to which it is a protection. Jacobs v. Hyde, note (b), 8

INSPECTION OF DOCUMENTS.

The 8th section of the Joint Stock Jobbing Act, imposes a penalty of 500L upon parties buying or selling stock of which the sellers are not possessed at the time of the contract; and the 9th enacts, that every broker shall keep a book of his transactions in the public stocks, and shall produce it "when thereunto lawfully required."

A broker having, as indorsee of a bill, brought an action upon it against the acceptor, the defendant, before pleading, moved,—upon an affidavit that the bill was believed to have been indorsed to plaintiff in payment of differences in respect of illegal agreements in stocks,—that the plain-

tiff should be ordered to produce his book for the defendant's inspection. The Court refused the rule, on the ground that the defendant had no interest in the book, and also that its production might expose the plaintiff to penalties. *Pritchett* v. *Smart*, 702

INSURANCE, (POLICY OF).

See DECLARATION, 8.

INTEREST.

See WRIT OF SUMMONS, 2.

INTERLOCUTORY RULES.

See RECORD.

INTERPLEADER ACT.

The sheriff having taken goods in execution, the attorney of A. claimed them for his client, and, upon an interpleader order being obtained, attended before the Judge with an affidavit made by himself, stating that from documents in his possession, he believed the goods to belong to A., who was abroad and unable to make an affidavit or to travel. The Judge thinking the affidavit insufficient, made an order barring the claim, under the 3rd section of the Interpleader Act.

Held, per Wilde, C. J., Maule, J., Cresswell, J., that the affidavit of the attorney was a sufficient statement of "the nature and particulars" of A.'s claim to satisfy the first section of the Interpleader Act, and that the order should be rescinded.

Held, per Williams, J., that the sufficiency of the statement was a question for the discretion of the Judge exclusively, and that the Court ought not to review the exercise of that discretion.

Held, per totum Curiam, that an affidavit by the claimant himself in support of his claim was not, under the above circumstances, necessary.

Semble, per Maule, J., that the

statement of "the nature and particulars" of a claim under the first section need not be made by affidavit. Webster, Bart. et Ux., v. Delafield,

INTERROGATORIES.

See Witness, (Commission to Examine).

IRREGULARITY.

See Practice, 2.
Writ, 2.
Writ of Summons.

After a writ of summons served, a Judge's order for payment of debt and costs by instalments was made by consent. Default having been made, the plaintiff, without entering an appearance for the defendant, signed judgment and proceeded to tax his costs. The bill of costs contained no charge for entering an appearance. The defendant attended the taxation, and asked for, and obtained, further time for payment. Held, on motion to set aside the judgment, on the ground that no appearance had been entered, that the defect was an irregularity merely, and not a nullity; and that the defendant had waived it, by attending the taxation and asking for further time to make the payment.

Quære, whether the decision in Thompson v. Becke (4 Q. B. 759), can be maintained to its full extent? Grandin v. Maddams, 241

ISSUE, SPECIFIC FINDING ON EACH.

See Arbitration, 5.

JOINT STOCK COMPANY.

See Attorney, (Bill of Costs), 2, 4. Scire Facias.

1. The affidavits in support of a rule under the 7 & 8 Vict. c. 110, s. 68, need not positively state that

the party is a shareholder of the company. It is sufficient if they shew that his name appears in a certified copy of the return of the names of the shareholders, made under the 18th section.

Nor is it necessary that the service of notice of application for the rule, required by the 68th section, should be personal. Turner v. The Metropolitan Live Stock Company, 59

- 2. Where a notice has been given on the part of a plaintiff of his intrition to proceed under the 7 & 8 Vict. c. 110, s. 68, to obtain execution against a former shareholder on a judgment obtained against a public company, and the matter has been heard before a Judge at Chambers and dismissed, an application to the Court cannot be founded on that notice, as by the hearing before the Judge it has been exhausted. Corden v. Universal Gas Light Company, 109
- 3. The 68th section of the 7 & 8 Vict. c. 110, which empowers the Court or a Judge at Chambers, to order execution to issue against a shareholder of a registered joint stock company, without suggestion or scifa., applies to the 66th as well as to the 67th sections of that act; that is, to actions by other persons as well as shareholders of the company. Peart v. The Universal Salvage Company,
- 4. The discharge of a rule for issuing execution against a share-holder of a registered joint stock company, on the ground that the requisite notice was not given to him, is no bar to a second application for the same purpose.

Nor will the Court refuse to entertain such application until the costs of the first rule have been paid.

A shareholder is presumed to continue in that character, till a transfer of his shares is duly registered.

Quare, as to the form of a writ of execution, under 7 & 8 Vict. c. 110, s. 68. Corden v. The Universal Gaslight Company, 379

5. On an application by a creditor who had obtained judgment against a completely registered company, for leave to issue execution against a shareholder, under the 7 & 8 Vict. c. 110, s. 68: Held, that that section applied to executions at the suit of creditors of the company, as well as at the suit of shareholders; but that a creditor seeking to avail himself of its provisions, must shew that he has first used all due diligence to obtain satisfaction from the assets of the company, before he will be allowed to proceed for the whole debt against an individual shareholder.

And that where the company had become insolvent, and its affairs had been referred to a Master in Chancery to be wound up, under the 11 & 12 Vict. c. 45, the creditor was bound to first prove his debt before the Master, and endeavour to obtain payment from the assets in the hands of the official manager, before he came to this Court for leave to issue execution against individual shareholders. Thompson v. Universal Salvage Company, 465

6. To an action of debt for work and labour, &c., brought against the Metropolitan Sewage Manure Company, the defendants pleaded, that as to 100% parcel, &c., the plaintiff was and still is the holder of 100 shares in the company, and before and at the time, &c. was and still is, indebted to the defendants in a large sum of money, to wit, 100l. in respect of a call of a certain sum of money, to wit, 1l. upon each of the said shares, &c., duly made by the defendants, which said sum of money still remains unpaid and due, and equals the said sum, parcel, &c. Held, that the plea was bad on special demurrer, for not averring, pursuant to the 8 & 9 Vict. c. 16, s. 26, that thereby and by virtue of that and the special act, an action had accrued to the company. Moore v. Metropolitan Sewage Manure Com-496

JUDGE'S ORDER, (RESCIND-ING).

See SECURITY FOR COSTS.

JUDGE AT CHAMBERS.

See Certiorari, 1.
Joint Stock Company, 2.
Venue, (Changing the).
Witness (Commission to Examine), 2.

It is competent for a Judge at Chambers to entertain an application to enter a suggestion, but the refusal of the Judge is not conclusive on the defendant so as to prevent him from applying to the Court for the same purpose. Peterson and Another v. Davis, 79

[See Hawkins v. Akrill, 1 L. M. & P. 242].

JUDGMENT, (ARREST OF).

See Amendment, 1.
Declaration, 2, 3, 7.
Replevin.

JUDGMENT (FOR WANT OF A PLEA).

See Pleas (Pleading Several), 2. Practice, 3.

JUDGMENT (IN FORMER ACTION).

See Pleas (Pleading Several), 1. Replication, 3.

JUDGMENT (SATISFACTION OF).

See REGULE GENERALES, 2.

JUDGMENT, NON OBSTANTE VEREDICTO.

See WITNESS, (ACTION AGAINST).

The declaration stated, that upon the assignment of the lease of a coal mine from the plaintiff, the lessee, to the defendant, the latter covenanted with the former, that he, the defendant, his executors, administrators, or assigns, should, so long as he or they should be in possession of the mine, pay the lessor the rent reserved; and should observe the covenants in the lease on the part of the lessee or assignee to be observed, or such of them as should be then subsisting, and should at all times thereafter indemnify the plaintiff against the rent and covenants contained in the lease, and against all actions, &c., in respect of such costs. Breach, first, that the defendant, while in possession, did not pay certain rent, whereupon the plaintiff was obliged to pay; and secondly, that the defendant did not indemnify the plaintiff.

Pleas: first, a traverse of the demise; secondly, as to the deed of assignment which contained the covenants, non est factum; thirdly, that when the rent accrued due, defendant was not in possession; fourthly, as to non payment of the rent, accord and satisfaction; fifthly, that the defendant did indemnify; and sixthly, that plaintiff did not pay the rent.

A verdict having been found for the defendant on the third issue, and for the plaintiff on all the others, and the Court,—being of opinion that the words restricting the first covenant to the time of the defendant's possession, did not extend to the covenant to indemnify; and that the third plea furnished no defence to the action: Held, that as the third plea was a traverse of an immaterial allegation, and as there were other pleas which were material, and which were disposed of on proper issues raised upon them, the plaintiff was entitled to judgment non obstante veredicto, and that there was no necessity for a repleader. Crossfield v. Morrison, 608

JURAT.

See Affidavit (Date of).

Married Woman (AcenowLEDGMENT OF).

JUS TERTII.

See BANKRUPT (Assigness of).

LACHES.

See PRACTICE, 2.

LANDLORD AND TENANT.

Partial eviction of lessee by lessor suspends the entire rent during the eviction; but the tenant is not thereby discharged from the observance of my of the covenants, except the covenant for the payment of rent.

Therefore, to a declaration by lessor against lessee, for breach of his promise to use the demised premises in a tenant-like manner, a plea of partial

eviction is no answer.

A plea, to such a declaration, of a surrender by operation of law, to wit, by defendant quitting the premises with the intention of determining the tenancy, and plaintiff accepting them with that intention, is bad; for, semble, it does not shew a surrender by operation of law; but if it does, it is an argumentative denial of any breach during the tenancy. Morrisos

LAW (TRAVERSE OF MATTER OF).

v. Chadwick,

See REPLICATION, 5.

LEGAL EFFECT, (NOT SET OUT).

See Declaration, 3.

LIEN OF ATTORNEY.

See Replication, 5.

An attorney with whom title deeds, the property of a member of a firm, have been deposited by that member in the course of professional business done on his private account, has no lien on them for a debt due from the partnership. Turner and Others v. Deane and Another, 669



LIGHTING AND WATCHING

The 3 & 4 Wm. 4, c. 90 (The Lighting and Watching Act) is a public act, and the power given therefore by the 69th section, of pleading the general issue, and giving the special matter in evidence, is not taken away by the 5 & 6 Vict. c. 97,

A notice of action under the above section against inspectors appointed under the provisions of the statute, for illegally executing a distress under a warrant of justices issued for non payment of a rate, given in the name of two persons, one being at the time dead, is bad.

Quære, whether such a notice is not bad, for merely stating that an action will be commenced, without specifying the particular kind of action. Pilkington v. Riley and Others, 628

LIMITATIONS (STATUTE OF).

1. An appearance entered after a distringas, and while the writ of summons is still in force, is an appearance to the writ of summons. It is, therefore, not necessary, in order to prevent the operation of the Statute of Limitations, that the writ of summons should, after an appearance entered by the defendant subsequently to the issuing of a distringas, be served on the defendant in person, or returned non est inventus, or entered of record in compliance with the provisions of the 10th section of the 2 Wm. 4, c. 39. Jones v. Boxer,

2. If a party be resident abroad at the accrual of a cause of action, and continue abroad until his death, his executors are entitled to sue for the debt within six years from the testator's death; although more than six years had elapsed between the period of the accruing of the cause of action

and of the testator's death.

Semble, per Parke, B., that in such a case the Statute of Limitations does not bar the right of action of the exe-

cutors, and that they may sue after any lapse of time. Townsend and Another, Executors of J. Hooper, Deceased, v. Deacon,

LONDON COUNTY COURT.

See Costs (Suggestion to Deprive PLAINTIFF OF), 2.

LUNATIC PAUPER.

An order upon the guardians of an union for the payment of the maintenance of a criminal lunatic, under the 3 & 4 Vict. c. 54, s. 2, did not direct the payment to be "on behalf of the parish" to which the pauper was chargeable: Held, no ground for quashing the order, as it recited all the facts establishing the liability of the parish; so that a payment in obedience to such order would be a payment on behalf of the parish, and chargeable thereto. Regina v. Justices of Berkshire,

MALICIOUS TRESPASS ACT.

See Notice of Action.

MANDAMUS.

See APPEAL. WITNESS (COMMISSION TO EXA-MINE).

MARRIAGE (BREACH OF PRO-MISE OF).

See Declaration, 5.

MARRIED WOMAN.

See Plea, 3, 6, 11. SCIRE FACIAS. 5.

MARRIED WOMAN (ACKNOW-LEDGMENT OF).

The Court directed the registrar to file the acknowledgment by a married woman pursuant to the 3 & 4 Wm. 4. c. 74, although it was doubtful whether there was not an erasure in the jurat of the affidavit of acknowledgment, it being certain that there was a rasure in it. In re Millard, 86

MATTER OF LAW (TRAVERSE OF).

See REPLICATION, 5.

MESNE PROFITS.

See TENANT.

MISTAKE.

See REFERENCE (ORDER OF), 2.

MONEY DEPOSITED IN LIEU OF BAIL.

See BAIL (MONEY DEPOSITED IN LIEU OF).

MORTGAGE.

- 1. To a rule calling upon the mortgagee, under the 7 Geo. 2, c. 20, s. 1, to shew cause why, upon payment of principal, interest, and costs, he should not re-convey the mortgaged premises, and deliver up deeds, &c.; it is an answer that the mortgagee has delivered a notice in writing under sect. 3, that he disputes the right of the mortgagor to redeem; although the delivery of such notice has been since the rule was obtained. (See the next case). Filbee v. Hopkins, 264
- 2. On an application by a mortgagor under the 7 Geo. 2, c. 20, s. 1, a notice under the 3rd section, merely stating that the mortgagee insists that the mortgagor has no right to redeem, and that the premises are charged with other sums than those appearing on the face of the mortgage, (without shewing on the face of it, or in the affidavit accompanying it, some reason why the mortgagor has no right to redeem, or what the other sums chargeable on the premises are), is insufficient. Doe dem. Harrison and Another v. Louch,
- 3. The 7 Geo. 2, c. 20, s. 1, which entitles a mortgagor, after action

brought, on payment of principal an interest, as well as all costs expende in any suit at law or in equity, to reconveyance of the lands, and to the delivery of the title deeds, does not apply to cases where the mortgagee in possession, or has attempted exercise his right of sale.

Where, therefore, a mortgage under a power contained in the mor gage deed, had, with the mortgagor concurrence, attempted to sell the property, but unsuccessfully, and he afterwards brought an action on the covenant, but which had been stay on payment of the principal and interest, the Court refused to compel his to reconvey and deliver up the time of the abortive sale, of the execution of the reconveyance, and of shewing cause against the rule. Sutton Rawlings,

NAME (CHRISTIAN). See Plea, 8.

NAMES (OMISSION OF).

See Plea, 10.

NEW SOUTH WALES (ATTOF NEY OF SUPREME COURT).

See REPLICATION, 5.

NEW TRIAL (NOTICE OF MOTION FOR).

See REGULE GENERALES, 3.

NON-JOINDER OF CO-DE-FENDANTS.

The Court set aside a plea in abate ment for non-joinder of co-defendant with costs, where the affidavit in verification of the plea stated the residenc of the parties at the time of the commencement of the suit only, and not at the time of the plea pleaded although the plea stated the residenc at the time of plea pleaded, and the affidavit averred that the plea was true.

in substance and in fact. White v. Gascoigne, 225

NON OBSTANTE VEREDICTO.

See Judgment Non Obstante Ve-REDICTO. WITNESS (ACTION AGAINST).

NONSUIT (JUDGMENT AS IN CASE OF).

See Costs, 3.

REGULE GENERALES, 4.

STAYING PROCEEDINGS, 4.

- 1. In this Court, where a rule nisi for judgment as in case of a nonsuit is discharged on a peremptory undertaking, the plaintiff is bound by the peremptory undertaking, although he never draws it up; and in order to entitle the defendant to a rule absolute for judgment as in case of a nonsuit, on a default, it is not necessary that he should first draw up and serve the plaintiff with the rule containing the peremptory undertaking. Nathan v. Story,
- 2. Where there was an issue in fact and an issue in law to be tried, and the plaintiffs gave notice of trial of the issue in fact, with assessment of contingent damages, &c., and pending the decision of the issue in law, countermanded their notice of trial, the Court discharged a rule for judgment as in case of a nonsuit, upon a peremptory undertaking being given. Connop and Another v. Levy, 282
- 3. Where a cause under a writ of trial stands over from one sheriff's Court to another, on account of the pressure of business, it is the same as where a cause is made a remanet from one sittings in London or Middlesex to another; and in the event of a subsequent default, the defendant is entitled to judgment as in case of a nonsuit; although the return day of the writ of trial is before the day to which the cause stands adjourned, and the plaintiff is obliged to alter the VOL. VI.

writ and get it resealed. Crockford v. Tucker, 542

NOT GUILTY (EFFECT OF).

See DECLARATION, 12.

NOTICE OF ACTION.

See LIGHTING AND WATCHING ACT.

A person who causes another to be arrested under the 7 & 8 Geo. 4, c. 30, bonå fide and reasonably believing that he is authorized so to do, is entitled to notice of action under sect. 41.

The question of bona fides is one

for the jury.

The defendant, who was the reversioner of certain premises, of which the plaintiff had a lease, and who had taken forcible possession of them for rent in arrear, gave the plaintiff's wife into custody under the 7 & 8 Geo. 4, c. 30, s. 24, for maliciously breaking four window panes.

No notice of action had been given, nor was the question of bona fides left to the jury: Held, that if the defendant reasonably believed that he was acting in pursuance of the statute, he was entitled to notice of action under sect. 41, and that the question of bona fides should have been submitted to the jury. Horn et Ux. v. Thornborough, 651

NOTICE OF ACT OF BANK-RUPTCY.

Notice of an act of bankruptcy, served on a clerk of the plaintiff's attorney issuing the writ of execution, such clerk not being shewn to have had personally the conduct of the suit, is not a sufficient notice under the 2 & 3 Vict. c. 29, s. 1, to take the execution out of the protection of that section. Pitts v. Stephens, 157

NOTICE OF DISHONOUR (STATEMENT OF).

See Amendment, 2.

NUL TIEL RECORD.

On a replication of nul tiel record to a plea of judgment recovered for the same cause of action against a co-contractor, the record, when produced, shewed a reversal on error, by consent. Held, that the plaintiffs were entitled to judgment, that the reversal were not presumptively fraudulent, being between the plaintiffs and a third party, and that the plaintiffs were not three-fore bound to reply the reversal, in order to enable the defendant to rejoin the fraud. Bailey and Another v. Turner.

ORDER OF MAINTENANCE.

See APPBAL, 2.

ORDER (APPLICATION TO RESCIND).

An application to rescind a Judge's order must be made within a reasonable time; and where a party does not apply within a reasonable time to rescind the order, he must be presumed to acquiesce in it.

Two years after the date of the order, is not a reasonable time. Griffin v. Bradley, 394

ORIGINAL.

See DEED (PROOF OF).

OUTLAWRY.

See WRIT, 2.

OYER (SETTING OUT DEED ON).

Semble, that if a defendant incorrectly sets out on over a bond and condition, the proper mode of taking advantage of the defect is by a motion to set aside the pleading. Kepp and Another v. Wiggett and Others, 96

PARISH.

See VESTRY MERTING.

PARTICULARS OF DEMAND.

Debt for the use and occupation of lodgings.

The particulars of demand stated that the action was brought to recover the sum of 421. 8s. 10d., being the balance of an account of 641. Os. 10d., and then proceeded to admit the payment of 211. 12s. The defendant had originally taken the apartments from the plaintiff's husband, but had cotinued to occupy them for some time after his death as tenant to the widow: Held, that the plaintiff was not concluded by the admissions in the bill, but was entitled to shew that a portion of the sum for which credit was given had been paid during her husband's lifetime. Mercy v. Galot, 656

PARTNERSHIP ACCOUNTS.

See REPLICATION, 2.

"PARTY GRIEVED."

See PROSECUTOR.

PAUPER PLAINTIFF.

See Costs, 2.
Staying Proceedings, 4.

If a plaintiff suing in formâ pauperis, and residing out of the jurisdiction of the Court, makes default in not proceeding to trial, the Court will stay proceedings until the costs occasioned by such default are paid. Cross, a Pauper, v. The Port of London Assurance Company, 250

PAYMENT (INTO COURT).

See Costs, 3.

PAYMENT OF DAMAGES AND COSTS.

See STAYING PROCEEDINGS, 1.

"PAYMENT AND DISCHARGE"

See PLBA, 2.

PEREMPTORY UNDER-TAKING.

See Nonsuit (Judgment as in Case of).

REGULE GENERALES, 4.

PEREMPTORY UNDERTAKING (ENLARGEMENT OF).

Where, on an application to enlarge a peremptory undertaking, after default made, the ground alleged is the absence of a material witness, (which was also the ground on which the rule for judgment as in the case of a nonsuit, had been discharged;) it is not necessary that the name of the witness should be stated. Wilkinson v. Willats,

PERFORMANCE (PLEA OF GENERAL).

See DECLARATION, 4.

PERSONAL SERVICE.

See Appeabance (Sec. stat.) 2.

PETTY SESSIONS (JURISDICTION OF).

See APPEAL, 2.

PLEA.

See Attorney (Bill of Costs), 5.
Declaration, 1.
Scire Facias, 2.
Set-off, 1.

To an action in debt the defendant pleaded, that after the accruing, &c., and after the passing the 5 & 6 Vict. c. 116, and before the passing the 7 & 8Vict. c. 96, and before the commencement of the suit, to wit, on, &c., a petition for the protection of the defendant from process was duly, and according to the form of the statute, &c., presented by the defendant to the Court of Bankruptcy, and filed in the said Court; that before the commencement of the suit, and after the passing of the secondly mentioned act, to wit, on, &c., a final order for protection and distribution was made in the matter of the said petition by J. E., Esq., a commissioner of the said Court of Bankruptcy duly authorized in that behalf; and that the debts, &c., accrued beforethedate of filing of the said petition in the said Court of Bankruptcy: *Held*, on special demurrer, that the plea was good in form as well as substance. *Platell* v. *Bevill*, 2

- 2. A plea of delivery and receipt of a bill of exchange "for and on account of, and in payment and discharge of, the said debt," &c., "and the said causes of action in respect thereof," is a plea in suspension only, and not in extinguishment of the debt. McDowall v. Boyd,
- 3. Declaration in assumpsit by the executors of J. M. on a promissory note for 60l., dated the 30th of March, 1835, made in the lifetime of the said J. M. by the defendant, and payable to J. M. six months after notice. Plea, that the said note was and is made payable to one Elizabeth Milling, who at the time of making the said note was the wife of the said J. M., and that the said note was so made payable to her by her then name of E. Milling, with the consent of the said J. M., her husband; and that the said note was not, nor is otherwise than as aforesaid, payable to the said J. M.; that the said J. M. did not in the lifetime of his said wife, who died in the lifetime of the said J. M., do any act to reduce the said note into possession, nor did he ever in the lifetime of his said wife, reduce the said note into possession. Held, on special demurrer, that the plea was bad, as amounting to an argumentative denial of the making of the note to J. M. Howard and Another, Executors of John Milling v. Richard Oakes,
- 4. In debt for rent against an executor as assignee of his testator, defendant pleaded in discharge of his liability otherwise than as executor, that he had entered as executor; that he had not derived any profit from the premises; that the premises had

not yieldedany profit since the testator's death; that the premises had vested in him only as executor, and that he had no assets. Replication: that defendant had derived profit, and that the premises had yielded him profit, to wit, to the amount of the rent. Held, that the plea must, after verdict, be understood as denying not only that the premises had, but also that they could have yielded any profit.

Therefore, it appearing at the trial that the defendant had not, but that he might have, derived profit from the premises,

Held, that the defendant was not entitled to a verdict on the issue upon

the plea; but

Held also, that the plea might be read distributively, that is, as a plea of no assets to each part of the plaintiff's demand; and therefore, that the verdict might be found for the plaintiff for a part only of the debt laid in the declaration. Hopwood v. Whaley,

5. The defendant pleaded to an action on a promissory note, that the plaintiff wrongfully detained his goods, and refused to give them up, unless he gave the plaintiff a promissory note; that he accordingly made the promissory note sued upon, and delivered it to the plaintiff, to obtain possession of his goods; and that except as aforesaid there was no consideration, &c.: Held, on special demurrer, that the plea was bad, and was no answer to the action.

Semble, the plea would have been good; if it had averred the circumstances under which the plaintiff obtained possession of the goods, or averred that the plaintiff knew he had

no right to the goods.

To an action by payee against maker of a promissory note, payable on demand, a plea that the note was made and delivered on account of a balance claimed by the plaintiff, and upon an agreement that the plaintiff should not enforce payment unless a balance was really due, with an averment that no balance was due, is a good plea, without alleging the agreement to be in writing. Kearns v. Durell,

6. To a count upon a bill by indorsee against acceptor, a plea that the drawer was a married woman at the time of the indorsement, and that her husband did not authorize or consent to her indorsement, was held bad, on the ground that the defendant was not at liberty to deny the maker's power to indorse, after having, by his acceptance of the bill, asserted that she had the power in question. Smith v. Marsack, 363

7. The declaration alleged that the defendants were common carriers of passengers from Southampton to Gibraltar, a place beyond the seas.

Plea; that the defendants were not common carriers of passengers, modo et formâ. Issue thereon.

Held, that the plea only put in issue the fact of the defendants carrying passengers from Southampton to Gibraltar for hire, and not whether they were "common carriers" in the strict technical sense of the term, and liable as such, according to the custom of England.

Quære, whether carriers of passengers from an English to a foreign port, are bound to receive and carry all passengers offering themselves, and ready to pay for their passage. Benett v. The Peninsular and Oriental Steam Boat Company.

8. To a declaration upon a bill by indorsee against acceptor, defendant pleaded that the bill was indorsed in blank; that when it became due one I. Shakespear Williams was the holder of it; that the defendant gave the said I. Shakespear Williams 10L in cash, and a promissory note for 15L 15s. for the bill, and all interest, charges, and claims in respect of it. Averment, that defendant had not, and had not been able to obtain knowledge of the first Christian name of Williams, "otherwise or to a greater extent than as set forth by the said initial letter."

PLEA. 778

Held, on special demurrer, first, that the plea was a good plea of payment: secondly, that the plea sufficiently set forth the title of Williams to the bill, and was not bad for omitting to allege that after the bill had been indorsed in blank, it was delivered to Williams; and thirdly, that the Court would intend that "I." was the Christian name of Williams, and not merely the initial letter of it. Lomax v. Landells, 396

9. To an action of assumpsit on a bill drawn by the Governor and Company of Copper Miners, and indorsed to the plaintiffs, and accepted by the defendant; the defendant pleaded,

among other pleas,

Fourthly, that the said Governor and Company of Copper Miners were a body corporate; that the said bill was made by their corporate name and style, and that it was indorsed by writing and signing, and not under the common seal of the said body, nor by any person having authority to do so.

Fifthly, that the Governor and Company of the Copper Miners were a body corporate; that the bill was made by them as such, and that they had no authority to indorse bills.

Held, on special demurrer, that the fourth plea was bad, as amounting to an argumentative denial of the indorsement; and that the fifth plea was also bad, on the ground that the acceptor of a bill, payable to the order of another, cannot be permitted to deny the authority of that person to indorse. Halifax and Others v. Lyle, 424

10. Debt against the maker of a promissory note. Plea, that it was made by the defendant as treasurer of a certain society, which consisted of divers persons, to wit, fifty persons, and was called The Silurian Lodge of Odd Fellows, &c. Held, on special demurrer, that the plea was bad, for not stating the names of the persons who composed the society, or alleging a reason for the omission. Williams v. Miles,

11. Declaration in case against the sheriff for the escape of one H., taken in execution upon a judgment at the suit of the plaintiff. Plea in bar, the coverture of the plaintiff, at the time of the accruing of the debt for which judgment recovered, and thence hitherto: *Held*, on special demurrer, that the plea was not a good plea in bar.

Quære, whether the plea would have been substantially good, if pleaded in abatement. Morgan v. Cubitt and Another, 444

12. To a declaration in debt containing three counts for 401. each, the defendant pleaded, first, as to the first and last counts, except so far as they relate to the sums of 10L and 9L 15s. 6d. parcel of the said monies, &c.; that the debts, &c., in those counts mentioned, except so far as they relate to the said sum of 91. 15s. 6d., accrued to the plaintiff before the making of the agreement thereinafter mentioned, to wit, for clothes delivered by the plaintiff to the defendant; that after the accruing of the said debts, &c., except, &c., it was agreed between the plaintiff and the defendant, in consideration that the defendant would deliver to the plaintiff an acceptance of the Earl of M., to wit, a certain stamped document, of which the plaintiff was the holder, accepted by the said Earl, without the name of the drawer, but with a blank space for it; the plaintiff would discharge the defendant from all claims for clothes, if the acceptance should be paid in six months; and if it should not be paid in that time, the defendant should be liable to pay the plaintiff 10% only on account of clothes, and that the said acceptance should be a full discharge and satisfaction of so much of such last mentioned claim as should exceed the sum of 101.; that the defendant did deliver to the plaintiff the said acceptance, and that the samo was not paid within six months, and the defendant thereby became liable to pay the said sum of 101. only.

Held, on special demurrer, that the plea was good. Curleweis v. Clark,

PLEA IN ABATEMENT.

See Non-joinder of Co-defendants. Plea, 11.

PLEADING, (DISTRIBU-TIVELY).

See PLBA, 4.

PLEAS (PLEADING SEVERAL).

- 1. To an action of trover, the Court allowed the defendant to plead, with pleas containing special defences, a plea that the plaintiff had impleaded the defendant in the Queen's Bench in respect of the same causes of action, and that the Court gave judgment for the defendant upon demurrer to the plaintiff's replication, which judgment was subsequently affirmed by a Court of error. Hutt v. Morell.
- 2. To an action of trover the defendant obtained leave to plead three pleas, of which the following was the abstract; first, not guilty; secondly, not possessed; thirdly, accord and satisfaction. Upon the pleas themselves being delivered, the third plea appeared to be one of accord and satisfaction "after action brought." The plaintiff thereupon signed judgment. Held regular. Gabardi v. Harmer, 481
- 3. By a special act incorporating a railway company, it was enacted, that all the provisions of the 8 & 9 Vict. c. 16, with respect to certain matters should, so far as they were applicable, and not inconsistent with the provisions of that act, be incorporated with it. By the 67th section, the company were empowered to raise a certain sum by the creation of new shares, upon such terms and in such manner as might be agreed upon at a general meeting specially convened. To an action for calls, in the form given

by the 8 & 9 Vict. c. 16, a. 26, the Court refused to allow the defendant to plead, in addition to never indebted, a denial of his being a shareholder, and that no calls had been made, the following pleas, namely, that there had been no meeting of the company before the shares were created, and that the shares were not agreed to be created at a meeting of the company.

Held, also, that the word share-holder" in the 8 & 9 Vict. c. 16, ss. 26 and 27, means a shareholder de jure, and one entitled to participate in the profits. The Shropshire Union Railway and Canal Company v. Anderson, 482

POLL OF VESTRY.

See VESTY MEETING.

PRACTICE.

See Order (Application to Rescind).

- 1. Where a vessel was taken by custom house officers for an alleged breach of the Foreign Enlistment Act, and after being detained some time, was released unconditionally, and proceeded on her voyage, and the owners afterwards brought an action in the Court of Common Pleas against the custom house officers for the alleged trespass in so seizing and detaining her: this Court, on motion of the Attorney General, and upon his statement without affidavit, removed the action into this Court, on the ground that the revenue of the Crown might be affected by it. In re an action in the Court of Common Pleas, between Adams and Another, Plaintiffs, and Freemantle and Others, Defendants, 10
- 2. A summons was taken out by the defendant on the 14th of August, 1848, before a learned Judge at Chambers, to set aside a declaration for irregularity, on the ground that more than "four Terms" had elapsed since the writ of summons had been served. The learned Judge dismissed the application, on the ground that the reason assigned was insufficient;

the rule being that a declaration should be filed not within "four Terms," but within a "year" of the service of the writ of summons. The defendant having afterwards obtained a rule before the full Court, for the same purpose, in the Michaelmas Term following; Held, that the decision of the learned Judge was correct, and that the application came too late. Chaplin and Another v. Showler,

3. Where the time for pleading expires on the 10th of August, the case falls within the Reg. Gen. Mich. Term, 3 Wm. 4, r. 12, and judgment for want of a plea cannot be signed till after the Vacation. Savery v. Lister, 257

PRÆCLUDI NON.

See REPLICATION, 6.

PRIEST IN ORDINARY TO THE QUEEN.

See PRIVILEGE FROM ARREST.

PRISONER, DISCHARGE OF.

Since the 1 & 2 Vict. c. 110, s. 18, giving to rules of Court for the payment of money the effect of judgments, a party in execution on a rule of Court for the payment of costs under 201., is entitled to the benefit of the 48 Geo. 3, c. 123, s. 1. Doe dem. Smith v. Roe,

PRIVILEGE FROM ARREST.

The Court discharged a defendant out of custody of the sheriff on arrest on final process, on the ground of his being privileged as a priest in ordinary of the Chapel Royal, upon proof that he had been appointed during a previous reign, and that he had performed his official duties on several important occasions in the present reign; that his name was enrolled in the books of the Lord Steward, and that he received a salary: without proof that he had been re-appointed

on the occasion of the present Sovereign; there being a letter of the Bishop of London appended to the affidavit, stating that no re-appointment was necessary on the demise of the Crown. Harvey v. Dakins, 437

PROFERT.

See DECLARATION, 9.

PROHIBITION.

Where an action is brought in an inferior Court, and the defendant appears at the trial, and makes no objection to the jurisdiction of the Court whilst the case is proceeding, but suffers the Court to act without protest or objection, as if it had jurisdiction, down to actual payment of damages and costs; it is too late to apply for a prohibition, even though the party had no opportunity of applying earlier to the superior Court; unless the want of jurisdiction appears upon the face of the proceedings.

Semble, that the action of replevin in the County Court is regulated by the 121st section of the 9 & 10 Vict. c. 95, and not by the 58th; and that, therefore, the mere fact of title being in question at the trial, does not take away the jurisdiction of the County Court, if neither party take any steps to remove the action under the 121st section. In re a Plaint or Action in the County Court of Staffordshire, Between Walter Yates, Plaintiff, and Sarah Palmer, Defendant.

PROMISSORY NOTE.

See Declaration, 2, 3. Plea, 3, 5, 10.

PROSECUTOR.

Where an indictment is removed from the quarter sessions into this Court by certiorari, at the defendant's instance, and the defendant is convicted, the party employing the attorney to conduct the prosecution, and

at whose charge the proceedings are carried on, is, the "prosecutor" of the indictment within the meaning of the 5 & 6 Wm. & M. c. 11, s. 3; and, if also a "party grieved" by the offence, is entitled to costs: although another party may have entered into the recognizances, and been bound over to prosecute the charge.

Whether the party claiming costs under the above section is, in point of fact, the "prosecutor" or not, is a matter which the Court will inquire into upon affidavit. Regina v. Bishop,

PUBLIC DOCUMENT.

See Inspection of Documents.

QUARTER SESSIONS, (JURISDICTION OF).

See APPEAL.

RAILWAY COMPANY.

See Attorney (Bill of Costs), 2, 4. Pleas, (Pleading several), 3.

RATE, (CONCLUSIVE, WHEN).

See Appeal, 1.

RECOGNIZANCE (UNDER 1 GEO. 4, c. 87).

See TENANT.

RE-CONVEYANCE.

See MORTGAGE.

RECORD.

See Nul Tiel Record. Replication, 1.

Interlocutory rules for the payment of costs do not form part of the record, notwithstanding the 18th section of 1 & 2 Vict. c. 110, which gives them the effect of judgments. Newton v. Boodle and Others, 352

RECORD (PRODUCTION OF).

See REGULE GENERALES, 1.

REDEEM (RIGHT TO).

See MORTGAGE.

REFERENCE, (ORDER OF)

See Arbitration. 1.

1. The attorney on the record authority to refer the cause. If client withdraw that authority fr him, and the attorney neverthel refer the cause, the validity of reference cannot be disputed up shewing cause against a rule enforcing the award; and, semithat the client's only remedy is again his attorney. Smith and Another Troup,

2. Upon a cause being referred arbitration by order of nisi pri the parties agreed that a statement certain sums admitted to be due the plaintiff should be annexed to order. One of these sums was 75 but, by the mistake of the copyclerk, 4601. was written in its place

Held, that the Court had no por to correct the mistake. Wynn Nicholson,

REGULÆ GENERALES.

- 1. That no subpoen duces tech be issued for enforcing the product of any record of the acts of any Cot deposited in the Public Record Offi pursuant to the statute 1 & 2 V c. 94, or any other document minute of proceedings officially find frecord in any Court, and deposi in the Public Record Office, pursuate the said statute; without an or of the Court out of which the subpoen shall issue, or of some Jucthereof. Reg. Gen. Easter Tel 11 Vict.,
- 2. Reg. Gen. East. Term, 7 Virevoked; and new form of satisfact piece substituted. Reg. Gen. Tr. Term, 11 Vict.,
- 3. It is ordered, that for the futu if a motion for a new trial be po poned beyond the first four days

Term, the attorney who has instructed counsel to make the motion shall give notice of it to the attorney of the opposite party, otherwise judgment signed on behalf of the opposite party shall be deemed regular. Reg. Gen. Mich. Term, 12 Vict.,

4. It is ordered, that where a rule for judgment as in case of a nonsuit shall have been discharged on a peremptory undertaking to try at the next or any future assizes or sittings, if the plaintiff shall make default in proceeding to trial pursuant to his undertaking, the defendant shall be at liberty, if the plaintiff does not draw up the rule, to draw it up at any time before moving for judgment, and thereupon to move for judgment without serving a copy of the rule on the plaintiff. Reg. Gen. East. Term, 12 Vict.,

REJOINDER.

See DISTRESS.

RENT.

See EXECUTOR. JUDGMENT Non OBSTANTE VEREDICTO.

REPLEADER.

See JUDGMENT NON OBSTANTE VEREDICTO. Witness (Action Against).

REPLEVIN.

See CERTIORARI, 2. PROHIBITION.

The effect of the 119th section of the County Courts' Act is to substitute a proceeding in replevin suits in the new district County Courts, in lieu of the old proceeding in the County Court.

Although, since the establishment of the district Courts, the jurisdiction to hear and determine replevin suits has been taken away from the sheriff and conferred upon those Courts, it is still his duty to make replevins, and to take bonds under the 11 Geo. 2, c. 19, s. 23, to prosecute the suit with effect and without delay.

A bond conditioned for appearing at the next County Court, and then and there prosecuting the suit with effect, is no longer a compliance with the provisions of the 11 Geo. 2, for that condition is now idle, if it requires a suit to be commenced in the County Court, and is insufficient if its effect be to require the suit to be prosecuted in the district Court, inasmuch as it does not require that to be done without delay.

The amount of rent for which the distress is made, plus the expenses of the distress, is a proper measure of damages in an action by the landlord against the sheriff for granting an insufficient replevin bond.

The declaration in such an action alleged that the County Court had no jurisdiction at the time of taking the bond: Held, upon motion in arrest of judgment, that it sufficiently appeared upon the declaration that the County Court had no jurisdiction at the time of making the plaint to the sheriff. Edmonds v. Challis and Another, 581

REPLICATION.

See DISTRESS.

1. To a declaration in debt, the defendant pleaded that he was an attorney of the Court of Queen's Bench, and privileged as such, and that he was not an attorney of the Court of Exchequer. The plaintiffs replied that the defendant was an attorney of the Court of Exchequer, concluding to the country: Held, on special demurrer, that the replication was bad, for not concluding with a verification by the record. Graham and Another v. Ingleby and Glover, 18

2. To a declaration on a bill of exchange by the drawer against the acceptor, the defendant pleaded that the bill declared on was given in discharge of another bill which was given in discharge of a previous bill, which was drawn for partnership purposes, and the proceeds of which were so applied; and that the partnership accounts had not yet been settled: Semble, that de injurià is a good replication to such a plea. Tibeldi v. Ellerman,

3. Declaration in trespass for mesne profits, stating the entry and expulaion to have been on the 10th of December, 1844, and the expulsion and taking of profits to have been continued until the 10th of March, 1846. Plea, that the closes in which, &c., were not, nor was any of them, or any part thereof, the plaintiff's, modo et forma. Replication to the whole of the plea, by way of estoppel, a recovery by the plaintiff against the casual ejector on a declaration in ejectment, stating the demise to have been on the 14th of October, 1845, for a term of twenty years, concluding with a prayer of judgment, if the defendant during that term ought to be admitted against the said recovery, record, and proceeding, to plead that plea. Held. on special demurrer, that the replication was bad, as the estoppel (if any) applied only to part of the time of the trespasses complained of, and, therefore, should have been replied to part only of the plea.

Quære, if a judgment against the casual ejector can be pleaded as an estoppel against the tenant in possession? Doe v. Wellsman, 179

4. To a count upon a bill by indorsee against indorser, defendant pleaded, that the maker, indorsee, and plaintiff were the same person, and that plaintiff would be liable upon the bill to the defendant, in the event of the latter paying it. Replication, that the plaintiff indorsed to defendant, in order that the latter might re-indorse it to him as surety for the acceptor, and that there was no consideration for the plaintiff's indorsement to defendant.

Held, that the replication was an

answer to the plea, and no departure. Smith v. Marsack, 363

5. To a declaration in detinue for a deed, the defendant pleaded that he was an attorney of the Supreme Court of New South Wales; that the deed was delivered to him by plaintiff as such attorney, and that plaintiff was indebted to him for business done, by reason whereof defendant claimed a lien on the deed. The replication traversed the lien claimed.

Held bad, for traversing mere matter of law.

Held also, that the plea was bad for not shewing that the defendant had a lien by the law of New South Wales. Astley v. Fisher, 376

6. Debt by an executor. Plea to its further maintenance, payment after action brought, with prayer of judgment, if the plaintiff ought further to maintain his action. Replication, a traverse of the payment without any special commencement of præcludi non: Held, on special demurrer, that the replication must be taken as if pleaded in maintenance of the action generally, and was therefore bad. Futvoye, Executor of Aldred, deceased v. Stevens, 440

REPRESENTATION, (FALSE).

See Estoppel.

REQUEST (IMMATERIAL AVERMENT, WHEN).

See SHERIFF.

RESCUE.
See Sheriff.

RESIDENCE (DEFENDANT'S).

See WRIT OF SUMMONS, 1.

"RESIDUE" OF DEBTS.

See DECLARATION, 10.

RETURN OF WRIT.

See Writ, 2.

Writ of Trial.

REVENUE OF CROWN.

See PRACTICE, 1.

The Court of Exchequer are always sitting to hear revenue matters. Regina v. Morse, 224

REVERSAL ON ERROR.

See NUL TIRL RECORD.

RULE FOR PAYMENT OF MO-NEY, (Under 1 & 2 Vict. c. 110, s. 18).

See Arbitration, 1, 4, 6.
Prisoner, (Discharge of).

Although the Court will not, generally, grant a rule to enforce an award under the 1 & 2 Vict. c. 110, s. 18, unless a demand be first made, of the sum awarded, upon the party against whom the rule is applied for, by the party in whose favour the award was made, or by his legally appointed attorney; such demand, will under special circumstances, be dispensed with. Smith and Another v. Troup,

RULE, (DRAWING UP).

See DISCHARGE OF DEFENDANT (UNDER 7 & 8 VICT. c. 96, s. 57).

SATISFACTION, (DELIVERY OF BILL OF EXCHANGE IN).

See PLEA, 2, 12.

SATISFACTION PIECE.

See REGULE GENERALES, 2.

SCIRE FACIAS.

See Joint Stock Company. Second Application.

1. The 7 Geo. 4, c. 46, s. 13, in enacting that "execution upon any

judgment obtained against any public officer for the time being" of a banking company, "may be issued against any member or members for the time being, of such corporation or copartnership," means an execution against the persons who, at the time of issuing the scire facias, are members of the banking company.

In issuing execution against the members of a banking company, against the public officer of which a judgment has been obtained, under the 7 Geo. 4, c. 46, s. 13, the proper course is to proceed first against those who are members at the time the scire facias issues; then, in the event of an execution against them being unsuccessful, against those who were members at the time of the contract being entered into; then, in the like event, against those who were so at the time of the contract becoming executed; and lastly, against those who were so at the time of the judgment being obtained.

And in order to obtain leave to issue a scire facias against members of the second or subsequent class, all that is necessary to be shewn on the face of the affidavits is a reasonable certainty that any further proceedings against the first or previous class of members would prove ineffectual.

It is no cause to shew against a rule for leave to issue a scire facias against a member of a banking company, who was a member at the time of the contract entered into, on a judgment obtained against the public officer of the banking company, that the judgment was fraudulently concocted to the prejudice of the members. That is the proper subject of a plea to the scire facias, or of an application to set aside the proceedings as fraudulent.

Execution cannot be had under the 7 Geo. 4, c. 46, s. 13, against persons who have become members of a banking company after the contract was completed, but who have ceased to be so before judgment obtained. Dedgson, P. O. v. Scott, P. O., 27

- 2. To an action on a sci. fa. to have execution against a member for the time being of a banking copartnership, under 7 Geo. 4, c. 46, s. 13, the defendant pleaded that the plaintiff had, before issuing the present writ, issued another writ of sci. fa., and obtained an award of execution against one J. A., another member for the time being of the same copartnership: Held bad, on demurrer. Burmester P. O. v. Cropton, 430
- 3. A creditor of a joint stock banking company, established pursuant to 7 Geo. 4, c. 46, who has obtained judgment against the public officer, cannot, after unsuccessfully suing out execution against a member for the time being, lie by for a period of time, and then come to the Court for leave to issue execution against members at the time of the contract entered into. on affidavits shewing that execution against members for the then time being, would prove fruitless; unless he can also shew that further efforts at execution against the members for the time being at the time when he first issued execution, would also have been fruitless.

Where the plaintiffs, in December 1846, had obtained judgment, and unsuccessfully issued execution against a member for the time being, of a joint stock banking company, but had not taken any further steps; although there were at the time two solvent persons, members of the copartnership: Held that they were not entitled, in Hilary Term, 1849, to a sci. fa. to have execution against the members at the time of the contract being entered into.

Where a member of such a copartnership had ceased to be a shareholder before the time when the contract was made, on which the company was sued, and had caused his name to be omitted in Schedule A., but had neglected to have it inserted in Schedule B., pursuant to the 7 Geo. 4, c. 46, s. 4: *Held*, that the question of his being a shareholder at the time of the

contract, was a matter to be tried on scire facias.

Semble, also, that a scire facias against members at the time of the contract being entered into, should state the prior execution against the members at the time of the execution, which is a condition precedent, and necessary to warrant the scire facias against a member at the time of the contract being entered into. The Bank of England v. Johnson, P. 0.

4. A declaration in scire facias upon a judgment recovered against the public officer of a banking company, under the 7 Geo. 4, c. 46, s. 13, referred to the act in one part as the "statute," and in others as the "statutes." It also described the defendant as "now" being a member of the said copartnership.

Held, on special demurrer, that the declaration was good, as the reference to the statute was surplusage, and the description of the defendant was correct. Nunn v. Claxton, 637

5. Execution upon a judgment recovered against the public officer of a joint stock banking company, sued as such, cannot be issued against a person, as a member for the time being, unless he legally fill that character; and it is not enough that he did acts by which he held himself out to the world as a member.

By a deed of settlement constituting a joint stock company, it was provided that the husband of a female shareholder should not be a member of the company in respect of such shares, but should be at liberty to become a member on taking certain steps specified in the deed. ried woman, with her own separate property, and with her husband's consent, purchased shares in her own name in the above company. She was registered as a shareholder, and returned as such to the Stamp Office. The defendant, her husband, received some of the dividends, for which he gave a receipt as her agent; and attended meetings which only shareholders were permitted to attend. He did not, however, take the steps required by the deed of settlement for investing himself with the character of a shareholder.

Held, that execution could not be sued out against him upon a sci. fa. as a member of the company for the time being, under the 7 Geo. 4, c. 46, s. 13. Ness v. Angas, 645

SEAL, (APPOINTMENT UNDER).

See Arbitration, 1.

SECOND ACTION.

See Staying Proceedings, 2, 3, 4.

SECOND APPLICATION.

See Appeal, 2.

Joint Stock Company, 2, 4.

Judge at Chambers.

After judgment against the P. O. of a banking company, a rule nisi for leave to issue a scire facias against B., one of the members at the time of the contract being entered into, was obtained. After being twice enlarged, the plaintiff gave notice to B. of his intention to abandon it, and pay the taxed costs, and the costs were taxed and paid to B. accordingly: Held, that the plaintiff was not precluded from again applying to the Court for leave to issue a scire facias against B.; although the affidavits disclosed no new facts.

Semble, that the rule prohibiting a party from moving the same rule twice, does not apply to motions for leave to issue a scire facias under the 7 Geo. 4, c. 46, s. 13; and that a second application may be made on new facts. Dodgson, P. O. v. Scott, P. O.

SECURITY FOR COSTS.

The Court rescinded a Judge's order staying proceedings in an action, on the ground of the plaintiff being

abroad, until security for costs were given (no such security having been given), it being sworn that the plaintiff had returned to England, and had no intention of going abroad again. Place v. Campbell,

SERVICE, (PERSONAL).

See Appearance (Sec. stat.), 2.
Joint Stock Company, 1.

SET OFF.

See Costs, (Suggestion to Deprive Plaintiff of), 8.

- 1. A debt accruing due since action brought, cannot be the subject of a set-off in such action. Richards v. James. 52
- 2. A Judge's order requiring the defendant to deliver a particular of his set-off, and ordering that "in default thereof the defendant shall be precluded from giving any evidence in support of such set-off at the trial," renders such evidence inadmissible at the trial. Young v. Geiger, 337
- 3. To a plea of set-off, alleging that the plaintiff, "before and at the time of the commencement of the suit, was and is indebted;" a replication, that the plaintiff "was not indebted modo et formâ," is good. Morrison v. Chadwick, 567

SET OFF, (CALLS DUE UPON SHARES).

See Joint Stock Company, 6.

SEVERAL COUNTS.

A declaration by the assignees of a bankrupt contained four counts: first, trover for a ship of the bankrupt, converted before bankruptcy. Secondly, trover for a ship of the assignees, converted after bankruptcy. Thirdly, that the bankrupt being sole owner of a ship, for the purpose of indemnifying the defendants against loss in respect of their accepting certain bills of exchange, empowered them by deed to sell the ship, of which purpose the

defendants had notice; that the defendants refused to accept the bills, but, contrary to the purpose, &c., sold the ship before the bankruptcy; whereby the assignees lost the possession of the ship, and the freight of her cargo. Fourthly, that the bankrupt empowered the defendants by deed to sell the ship, but at the same time wrote them instructions by letter not to do so, and that the defendants, contrary to their instructions, nevertheless sold the ship; concluding with the same damage as in the third count.

SHERIFF.

Held, that the first and third, and the second and fourth counts, were for the same causes of complaint, and were in apparent violation of the rule of Hilary Term, 4 Wm. 4, Pt. II. r. 5. Dearie and Others, Assignees, &c. v. R. Henderson and Another,

SHAREHOLDERS. See JOINT STOCK COMPANY.

SHERIFF.

See Attorney, 2. BANKRUPT. DISTRESS. WRIT OF TRIAL.

The sheriff is bound, in executing a capias (under 1 & 2 Vict. c. 110, s. 3), to provide such a force as will enable him to effect a caption, in spite of any resistance, which he has reason to anticipate.

Although if the prisoner be rescued, a return of the rescue is good.

The declaration, after stating that a ca. ad resp., issued against K., had been delivered to the sheriff for execution, stated that the sheriff, though often requested, did not take K., and falsely returned, non est inventus. Pleas: first, not guilty; secondly, that K. was not indebted to plaintiff; thirdly, that K. was not in the bailiwick; fourthly, that defendant could not have arrested K.: and fifthly, that defendant had not notice that he could have arrested him.

Evidence was offered that plaintiff had directed the sheriff not to arrest K. at a particular time and place: Held, not admissible under any of the issues.

Held also, that the breach of duty of the sheriff was the not arresting when he could and might, not his omission to arrest after request; and that the allegation, therefore, of the plaintiff's request, was immaterial. Howden v. Standish,

SHERIFF, (CASE AGAINST, FOR NOT ARRESTING).

See DECLARATION, 7.

SHERIFF'S OFFICER.

See BAILIFF.

SIGNED BILL, (DELIVERY OF).

See Attorney, (BILL OF COSTS), 2. 4. 5.

SIGNING JUDGMENT.

See WRIT OF TRIAL.

SOCIETY, (PROMISSORY NOTE BY TREASURER OF).

See PLEA. 10.

SPECIAL JURY.

The defendant having obtained a rule for a special jury, and had the jury nominated and reduced, a day was fixed for trial. When the appointed day arrived, it was found that no special jury process had been carried in: the cause was accordingly tried by a common jury as undefended, and a verdict given for the plaintiff. The Court set aside the Haldane v. verdict as irregular. Beauclerk,

STAYING PROCEEDINGS.

1. Where the plaintiff, in an action to recover unliquidated damages for breach of contract, to which the defendant had pleaded special pleas, recovered a verdict on all the issues.

STOCK JOBBING ACTS.

with damages: the Court refused to stay proceedings before judgment signed, on payment by the defendants of the amount of damages and costs. Peat v. Mangnall and Another,

2. Where a plaintiff has been taken in execution for the costs of a former action, but has subsequently been discharged upon her own petition under the Insolvent Debtors' Act, the Court will direct the proceedings in the second action to be stayed, until the costs of the former are paid. Stilwell v. Clarke,

3. Where the plaintiff had brought seven different actions for seven different publications of the same libel, against the same defendant; the Court ordered proceedings to be stayed in all the actions, except one, until that one had been tried. Jones v. Pritchard,

4. The plaintiff, having been nonsuited upon the merits in an action of slander, in which the defendant had pleaded a justification, commenced, without having paid the defendant's costs, a second action in forma pauperis, for substantially the same slander as that declared upon in the first action, and also for other slanderous words spoken on the same occasion as that slander.

The Court stayed the proceedings in the second action until payment of the costs of the first.

A similar stay of proceedings was granted where the plaintiff had withdrawn the record in the first action, and the defendant had obtained judgment as in case of a nonsuit. Hoare (a Pauper) v. Dickson, 577

5. The superior Courts will stay proceedings in actions for a sum less than 40s., when they might have been recovered in an inferior Court.

The practice of staying such actions has not been affected by the City of London Small Debts' Act, 10 & 11 Vict. c. 71. Stutton v. Bament, 632

STOCK JOBBING ACTS.

See Inspection of Documents.

TIME (ASKING FOR). 783

SUBPŒNA.

See WITNESS (ACTION AGAINST).

SUBPŒNA DUCES TECUM.

See REGULE GENERALES, 1.

SUGGESTION.

See Costs (Suggestion to Deprive Plaintiff of). Judge at Chambers.

SUMMONS (SERVICE OF).

See County Court.

"SUM RECOVERED."

See Discharge of Defendant (Under 7 & 8 Vict. c. 96, s. 57).

SURRENDER (PLEA OF).

See LANDLORD AND TENANT.

SUSPENSION (OF CAUSE OF ACTION).

See PLEA, 2.

TAXATION.

See ATTORNEY (BILL OF COSTS), 3. COSTS.

TENANT.

On an application under the 1 Geo. 4, c. 87, s. 1, the Court will not include in the security to be given by the tenant, damages alleged to have been caused by the tenant, or those under him, to the trade of the demised premises. Dos dem. Marks and Another v. Roe,

TERM.

See WRIT, 2.

TESTE.

See WRIT, 1.

TIME (ASKING FOR).

See Irregularity.

TIME (ENLARGEMENT OF, FOR MAKING AWARD).

See Arbitration, 2, 3, 6.

TIME (REASONABLE).

See Onder (Application to Rescuid).

TIME FOR PLEADING.

See PRACTICE, 3.

TRAVERSE (TOO LARGE).

See DECLARATION, 8.

TRESPASS.

See DECLARATION, 1.
NOTICE OF ACTION.

TRESPASS FOR MESNE PROFITS.

See REPLICATION, 3.

TRIAL (IRREGULAR).

See SPECIAL JURY.

TROVER.

See Pleas (Pleading Several), 1, 2,

> VACATION (LONG). See Practice, 3.

> > VARIANCE.

See Declaration, 6. Writ of Error.

VARIANCE (BETWEEN ABSTRACT AND PLEAS DELIVERED).

See Pleas (Pleading Several), 2.

VARIANCE IN AFFIDAVIT.
See Bail (Appidavit to hold to), 3.

VESTRY MEETING.

VENUE (CHANGING THE)

On the 22nd of February, the time for pleading expired; on the 23rd, 1 summons for time to plead was takes out; on the 24th, an order for time on the usual terms was made; the defendant did not draw it up, but or the same day served a rule to chan the venue, and delivered a plea. On the 25th, the issue was delivered, with notice of trial in the crisial county. On the 26th, a summer's set aside the issue and notice of rid was served. On the 28th, an orig rescinding the rule to change the venue, and directing the notice of trial to stand was made by a Judge at Chambers. At the ensuing assizes the defendant did not appear, and the cause was taken as undefended: Held first, that a Judge at Chambers has power to rescind a rule of Court changing the venue; and, secondly, that under the circumstances, such order ought not to have been made. Darrington v. Price,

VENUE (UNDERTAKING TO GIVE MATERIAL EVIDENCE)

Evidence which goes to the amount of damages, is material evidence within the meaning of the undertaking, on bringing back the venue to the county in which it was originally laid. Jones v. Smith, 9

VERDICT (DISTRIBUTIVE).

See FERRY (RIGHT TO). PLEA, 4.

VERIFICATION BY THE RECORD.

See REPLICATION, 1.

VESTRY MEETING.

A local act (54 Geo. 3, c. exiii.

a. 3), enacted that at a vestry meeting
to be held on Easter Tuesday in

every year, all the vacancies in the list of governors and guardians of the poor should " be filled up by poll or ballot, or in such way of election as should be deemed most proper and convenient." At a vestry meeting held accordingly, the mode of election pursued was as follows: Two candidates were proposed for each vacancy; on a shew of hands being taken, the one in whose favour it appeared to be, was declared elected; and then two other candidates were proposed for the next vacancy; and so on, till all the vacancies were filled up. One of the rejected candidates demanded a poll of the inhabitants of the parish, which was refused by the chairman, who proceeded to complete the elections according to the mode above described.

Held, that this mode of election could not be sustained.

Held also, that it was the meeting itself, and not the chairman, which was to pronounce what was the "most proper and convenient" mode of election; the right to determine the mode of election being limited to a choice among such modes as might best fulfil the object of the section, which was to secure the filling up of the vacancies by a real election made by the inhabitants in vestry assembled.

The 3rd section of the local act requires a vestry meeting to be called on Easter Tuesday in every year, " at which said vestry meeting" the vacancies in the list of governors and guardians of the poor are to be filled up: and "the inhabitants in vestry assembled in such manner, and at such time, as aforesaid, are to nominate and choose" certain persons to be governors and guardians in the room of those resigning: Held, that these provisions were not strong enough to control the general rule of law which requires the poll to be of the parish generally.

By the 2nd section of the 54 Geo. 3, c. cxiii., certain persons ex officio, vol. vi.

and certain others named, are appointed governors and guardians of the poor. By the 3rd section, provision is made for the supply of vacancies occurring between Easter and Easter. This is to be done by the remaining or continuing governors and guardians, who are to call a vestry meeting of the inhabitants of the parish on Easter Tuesday, at which the elections are to be made, " provided always, that after the expiration of one year from Easter Tuesday next after the passing of this act it shall, and may be lawful for the inhabitants of the said parish in vestry assembled, in such manner and at such time as aforesaid, also to nominate and choose twelve persons," &c. Held, that the words "assembled in such manner" mean, among other things, assembled by virtue of a summons from the governors and guardians; and that therefore a rule for a mandamus to call a vestry meeting for the purpose of proceeding to such election, was properly directed to the governors and guardians, notwithstanding the 58 Geo. 3, c. 69, s. 1, and 1 Vict. c. 45, s. 3. Regina v. The Governors and Guardians of the Poor of the Parish of St. Mary, Newington,

VIDELICET.

VIDELICET.

Dates which are material in a plea are not rendered immaterial by being laid under a videlicet.

Therefore, where it was material to the validity of a plea that the facts therein stated should have occurred before the passing of an act of Parliament, and the plea did not in terms aver that they did so occur, but stated them to have occurred under a videlicet, on certain days which were in fact prior to the passing of the act: Held, on special demurrer, that these averments of dates were material, though under a videlicet. Nash v. Brown, 329

WAIVER.

See IRREGULARITY.
PROHIBITION.
VENUE (CHANGING THE).
WRIT, 2.
WRIT OF SUMMONS, 1.

WINDING UP ACT.

See Joint Stock Company, 5.

WITNESS.

See Costs, 2.

WITNESS (ACTION AGAINST).

In an action against a witness for not obeying a subpœna, proof of actual damage having been sustained by the plaintiff through the witness' breach of duty is essential, as the law will not imply a loss to the plaintiff from a mere disobedience to a subpœna.

The action will lie if the witness' evidence was material upon any one of the issues, even though the plaintiff had not a good cause of action.

The declaration alleged that plaintiff had brought an action against F.; that certain issues came on to be tried; that defendant was subpœnaed by plaintiff; that plaintiff had a good cause of action, and that the defendant's evidence was material to the trial of the issues. Breach, neglect to attend; whereby the plaintiff had to pay certain costs to F., and lost the benefit of certain costs which he had incurred. &c.

The defendant pleaded several pleas traversing the material allegations in the declaration, and among them, eighthly, a traverse that plaintiff had a good cause of action, and ninthly, a traverse that defendant's evidence was material; he also pleaded the general issue, and leave and license.

The jury having found for defendant on the eighth issue, and for the

plaintiff on all the others,

Held, first, that the eighth plea traversed an immaterial allegation.

Secondly, that the allegation that the defendant was a material witness on the issues was, after verdict, a sufficient allegation that plaintiff would have succeeded on some of them, if the defendant had given his evidence; and thirdly, that the plaintiff was entitled to judgment non obstante veredicto, and that a repleader was unnecessary. Couling v. Caxe, 399

WITNESS (COMMISSION TO EXAMINE.)

- 1. An order for the examination of a witness under interrogatories, will not, in general, be granted before issue joined; and where the application was made before plea pleaded, the Court refused to grant it, although the witness was in an infirm state of health, and it was probable that he might die in the meantime. Clutter-buck v. Jones and Another, 251
- 2. A Judge at Chambers has no power to grant a writ in the nature of a mandamus or commission to examine witnesses in India or the colonies, under the 13 Geo. 3, c. 63, s. 44, and the 1 Wm. 4, c. 22.

The application for such a wit should be made to the Court. Clarke and Others v. The East India Company, 278

WRIT.

- 1. A writ issuing from an inferior Court must be tested on a Court day.

 Humphries v. Longmore and Smith,
- 2. A writ of ca. sa. to proceed to outlawry was tested on the 12th of March, 1847, returnable on the 15th of April then next. The writ of exigi facins was tested on the 15th of April, 1847, returnable on the 12th of June then next. Held, on motion to set aside the proceedings, that both writs were wrong; the ca. sa. in being tested in Vacation, and the exigi facias in not being tested on the quarto die post of the return of the capias, and in not being made returnable either

on the third day exclusive before the commencement of Term, or between that day and the third day exclusive before the last day of Term, according to the 1 Wm. 4, c. 3, s. 2; but that the defects amounted only to an irregularity, which might be waived. Braham v. Hunter,

WRIT OF ERROR.

The Court below have no jurisdiction to amend the transcript of the record returned by the Chief Justice to a writ of error.

Semble, if an omission in the transcript be complained of, that the proper course is to allege diminution in assigning errors. Newton and Ux. v. Boodle and Others.

WRIT OF INQUIRY.

See Costs (Suggestion to Deprive Plaintiff of), 9.

WRIT OF SUMMONS.

See Appearance (Sec. Stat.), 2. Limitation (Statute of).

1. The omission of the name of the county in the description in the writ of summons of the defendant's residence, is merely an irregularity, which is waived, if not made the subject of an application within a reasonable time. Ross v. Gandell, 2. The copy of a writ of summons indorsed with a claim for 102*l*. and interest, at 4*l*. per cent., "from the 31st of March," without stating of what year, was set aside, with the service thereof, for irregularity. Bardell v. Miller, 721

WRIT OF TRIAL.

See Nonsuit (Judgment as in Case of), 3.

The words "at the return of any such writ," in the 18th section of the 3 & 4 Wm. 4, c. 42, mean at the return day named in the writ.

Therefore, where upon a writ of trial before the sheriff, the verdict was returned for the defendant, who proceeded to tax his costs and sign judgment, before the return day named in the writ, although after the actual return of the writ by the sheriff: *Held*, that the judgment so signed was irregular.

The sheriff has no power to accelerate or postpone the return of a writ of trial. Holmes v. The London and South Western Railway Company, 536

000

YEAR (DECLARATION TO BE FILED WITHIN A).

See PRACTICE, 2.

THE END.



	•		
	,		

